

UNITED STATES BANKRUPTCY COURT

IN RE: SonicBlue Inc., Diamond Multimedia Systems Inc., Replytv Inc., Sensory Science Corp.
In a Chapter 11

through 03-51778 MM (Jointly Administered)

Case No.: 03-51775 MM (Case Nos. 03-51775

Adv. Case No.:_

FILED
2007 NOV 29 A 9 52
RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

**TRANSMITTAL OF WITHDRAWAL OF REFERENCE
TO THE DISTRICT COURT**

1. ☒ **Motion or order to withdraw reference.**
2. ☐ **Certificate to the District Court** non-core proceeding pursuant to B.L.R. 9015-2(b) demand for jury trial.
3. ☐ **Certificate to the District Court** pursuant to B.L.R. 9015-2(d) personal injury tort and wrongful death claims

DATE FILED: __[Date Filed]

FILED BY (MOVANT): __Stroock and Stroock and Lavan LLP

ATTORNEY: __Lewis Kruger
__180 Maiden Lane, New York, NY 10038

PLEADINGS TRANSMITTED TO DISTRICT COURT

☒ Motion or Order to Withdraw Reference
☐ Memorandum in Support of Motion to Withdraw Reference
☐ Response to Motion to Withdraw Reference
☐ Certificate to the District Court
☐ Certified Copy of Bankruptcy Docket Sheet
☒ Other Pertinent Record: _Request for Judicial Notice_

COUNTY OF DEBTOR(S) RESIDENCE: _Santa Clara

DATE: __11/28/07

TRANSMITTED: __11/29/07

By: _Janet Dustin, Deputy Clerk

Phone No.: _408-535-5099

C07 06025 JW
DISTRICT COURT CASE NUMBER:

DATE: NOV 30 2007 BY: Cindy Vargas

PLEASE RETURN SECOND COPY UPON RECEIPT

cc: Attorney for Movant
Attorney for Respondent

E-Filed

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15 UNITED STATES BANKRUPTCY COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 SAN JOSE DIVISION

18 ----- x

19 In re : Bankruptcy Case No. 03-51775

20 : Chapter 11

21 SONICBLUE INCORPORATED, a Delaware : **NOTICE OF MOTION AND MO-**
 corporation; DIAMOND MULTIMEDIA : **TION TO WITHDRAW REFER-**
 22 SYSTEMS, INC., a Delaware corporation; : **ENCE OF CHAPTER 11 CASES**
 REPLAYTV, INC. a Delaware corporation; :
 and SENSORY SCIENCE CORPORATION, a :
 23 Delaware corporation, :
 :
 24 Debtors and Debtors in Possession. :
 :
 25 :
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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on a date to be determined before the United States District
3 Court for the Northern District of California ("District Court"), located at the United States Court-
4 house, 280 South First Street, San Jose, California, 95113, Portside Portside Growth & Opportunity
5 Fund, Smithfield Fiduciary LLC and Citadel Equity Fund Ltd. (collectively, the "Senior Notehold-
6 ers"), will and hereby do move, pursuant to section 157(d) of title 28 of the United States Code and
7 Rule 5011(a) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), for an order
8 withdrawing the reference of the chapter 11 cases of the above-captioned debtors (the "Chapter 11
9 Cases"). Because this motion to withdraw the reference is related to the appeal ("Appeal") pending
10 in the District Court before the Honorable Ronald M. Whyte, Case No. 07-02553, and is being filed
11 in conjunction with the Senior Noteholders' opposition to the Chapter 11 Trustee's Motion to Dis-
12 miss Appeal, contemporaneously herewith the Senior Noteholders will file an ex parte administra-
13 tive motion to consider whether the Appeal and this motion are related and should be assigned to
14 Judge Whyte. Under Federal Rule of Bankruptcy Procedure 5011 and Bankruptcy Local Rule
15 5011-2, this motion is being filed with the clerk of the Bankruptcy Court for transfer to the District
16 Court.

17 This motion is made on the grounds that cause exists for the District Court to withdraw the
18 reference of the Chapter 11 Cases. Upon the filing of the notice of appeal by the Senior Notehold-
19 ers, the Bankruptcy Court was divested of jurisdiction over those aspects of the case on appeal. As
20 such, the District Court has become the most appropriate forum for the resolution of the Chapter 11
21 Cases, and withdrawal of the reference is necessary to ensure the efficient administration of these
22 cases.

23 This motion is based on this notice of motion and motion, the below Memorandum of
24 Points and Authorities, the Request for Judicial Notice (a copy of which is attached hereto as Ex-
25 hibit 1), the record in these cases, and any further evidence or argument the court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Senior Noteholders are entitled to the relief requested in this motion for the reasons set forth in the Memorandum of Points and Authorities in Support of Senior Noteholders' Opposition to Motion to Dismiss Appeal and Cross-Motions for Limited Stay of Proceedings and/or to Withdraw the Reference of the Chapter 11 Cases ("Cross-Motions MOL") filed in the District Court (a copy of which is attached hereto as Exhibit 2). The Senior Noteholders hereby incorporate the Cross-Motions MOL herein by reference.

Dated: November 20, 2007

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By: /s/ Lewis Kruger

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re

SONICBLUE INCORPORATED, a Delaware
 corporation; DIAMOND MULTIMEDIA
 SYSTEMS, INC., a Delaware corporation;
 REPLAYTV, INC., a Delaware corporation;
 and SENSORY SCIENCE CORPORATION, a
 Delaware corporation,

Debtors and Debtors in Possession.

Case No. C-07-02553 RMW

**REQUEST FOR JUDICIAL NO-
 TICE IN SUPPORT OF SENIOR
 NOTEHOLDERS' OPPOSITION
 TO MOTION TO DISMISS AP-
 PEAL AND CROSS-MOTIONS
 FOR LIMITED STAY OF PRO-
 CEEDINGS AND/OR TO WITH-
 DRAW REFERENCE OF CHAP-
 TER 11 CASES**

1 Appellants Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and Citadel
2 Equity Fund Ltd. (the "Senior Noteholders"), by and through their counsel, hereby request the
3 Court to take judicial notice of these certain items designated in the Senior Noteholders' Designa-
4 tion of Items to be Included in the Record on Appeal and Statement of Issues on Appeal (the
5 "ADR") (Docket No. 3), the and certain additional items pursuant to Federal Rule of Evidence 201:

6 1. Order Granting Debtors' Motion for Approval of Settlement of VIA and Intel Liti-
7 gation, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
8 Case No. 03-51775 (Docket No. 1981).

9 2. Motion by United States Trustee for Appointment of a Chapter 11 Trustee or, in the
10 Alternative, an Examiner, In re SonicBlue Inc., United States Bankruptcy Court for the Northern
11 District of California, Case No. 03-51775 (Docket No. 2153) (ADR, Ex. 28).

12 3. Motion to Disqualify Pillsbury Winthrop Shaw Pittman LLP, to Vacate Employ-
13 ment Order, and for Disgorgement of Attorneys' Fees, In re SonicBlue Inc., United States Bank-
14 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2163) (ADR,
15 Ex. 29).

16 4. Amended Motion of United States Trustee for Appointment of Chapter 11 Trustee,
17 In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case
18 No. 03-51775 (Docket No. 2168) (ADR, Ex. 30).

19 5. Motion to Convert Case to Chapter 7, In re SonicBlue Inc., United States Bank-
20 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2171) (ADR,
21 Ex. 31).

22 6. First Amended Motion to Convert Case to Chapter 7, In re SonicBlue Inc., United
23 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
24 2173) (ADR, Ex. 32).

25 7. Memorandum Decision and Order on Motion to Appoint a Chapter 11 Trustee, Mo-
26 tion to Convert Case, and Motion to Disqualify Pillsbury Winthrop Shaw Pittman LLP and for
27 Disgorgement of Attorneys' Fees, In re SonicBlue Inc., United States Bankruptcy Court for the
28 Northern District of California, Case No. 03-51775 (Docket No. 2220) (ADR, Ex. 49).

1 8. Motion for Clarification, or in the Alternative, Leave to File a Motion for Reconsid-
2 eration, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
3 nia, Case No. 03-51775 (Docket No. 2231) (ADR, Ex. 51).

4 9. Application for Order Approving the Appointment of Chapter 11 Trustee, In re
5 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
6 03-51775 (Docket No. 2239).

7 10. Order Approving Appointment of Chapter 11 Trustee, In re SonicBlue Inc., United
8 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
9 2242).

10 11. Memorandum Decision and Order on Motion of Senior Noteholders for Clarifica-
11 tion, or in the Alternative, Reconsideration, In re SonicBlue Inc., United States Bankruptcy Court
12 for the Northern District of California, Case No. 03-51775 (Docket No. 2279) (ADR, Ex. 57).

13 12. Notice of Appeal to District Court, In re SonicBlue Inc., United States Bankruptcy
14 Court for the Northern District of California, Case No. 03-51775 (Docket No. 2292) (ADR, Ex. 58).

15 13. Notice of Transfer of Claim Other Than for Security, In re SonicBlue Inc., United
16 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
17 2316).

18 14. Motion for Order (1) Directing United States Trustee to Change the Membership of
19 Official Committee of Creditors Holding Unsecured Claims, or (2) Directing the Appointment of a
20 New Trade Creditor Committee, In re SonicBlue Inc., United States Bankruptcy Court for the
21 Northern District of California, Case No. 03-51775 (Docket No. 2341).

22 15. Joint Chapter 11 Plan of Liquidation Proposed by Dennis J. Connolly, Chapter 11
23 Trustee, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
24 nia, Case No. 03-51775 (Docket No. 2391).

25 16. Disclosure Statement Describing Joint Chapter 11 Plan of Liquidation Proposed by
26 Dennis J. Connolly, Chapter 11 Trustee, In re SonicBlue Inc., United States Bankruptcy Court for
27 the Northern District of California, Case No. 03-51775 (Docket No. 2392).

1 17. Objection of SonicBlue Claims LLC to Disclosure Statement Describing Joint
2 Chapter 11 plan of Liquidation Proposed by Dennis J. Connolly, Chapter 11 Trustee, In re
3 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
4 03-51775 (Docket No. 2429).

5 18. Emergency Motion for Protective Order in Respect of SonicBlue Claims' Notices of
6 Deposition of Henry Kevane, John J. Todd, Albert Boro, Suzanne Uhland, and Bruce Bennett, on
7 September 6, 10, 11, 12 and 13, 2007, In re SonicBlue Inc., United States Bankruptcy Court for the
8 Northern District of California, Case No. 03-51775 (Docket No. 2436).

9 19. Response to Motion for Order Shortening Time on Trustee's Motion for a Protective
10 Order, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
11 Case No. 03-51775 (Docket No. 2445).

12 20. Opposition to Trustee's Motion for a Protective Order, In re SonicBlue Inc., United
13 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
14 2458).

15 21. Transcript of Proceedings, September 5, 2007, In re SonicBlue Inc., United States
16 Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2504).

17 22. Transcript of Proceedings, September 20, 2007, In re SonicBlue Inc., United States
18 Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2505).

19 23. Order Granting Motion for Order (1) Directing United States Trustee to Change the
20 Membership of Official Committee of Creditors Holding Unsecured Claims, or (2) Directing the
21 Appointment of a New Trade Creditor Committee, In re SonicBlue Inc., United States Bankruptcy
22 Court for the Northern District of California, Case No. 03-51775 (Docket No. 2510).

23 24. Status Report of the Chapter 11 Trustee Pursuant to 11 U.S.C. §§ 105(d),
24 1106(A)(3), (A)(4), and (A)(5), In re SonicBlue Inc., United States Bankruptcy Court for the
25 Northern District of California, Case No. 03-51775 (Docket No. 2515).

26 25. Notice of Dissolution of Official Committee of Creditors Holding Unsecured
27 Claims, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
28 nia, Case No. 03-51775 (Docket No. 2520).

1 26. Motion for Partial Relief from Order Granting Debtors' Motion for Approval of Set-
2 tlement of VIA and Intel Litigation, In re SonicBlue Inc., United States Bankruptcy Court for the
3 Northern District of California, Case No. 03-51775 (Docket No. 2545).

4 27. Motion to Vacate or Modify in Part Order Approving VIA Settlement Based Upon
5 Fraud on the Court Due to Counsel's Failure to Disclose a Material Conflict of Interest, In re
6 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
7 03-51775 (Docket No. 2548).

8 28. Complaint for Equitable Subordination, to Determine Proper Classification, and for
9 Declaratory Relief Regarding Senior Indebtedness Status, SonicBlue Claims LLC v. Portside
10 Growth & Opportunity Fund (In re SonicBlue Inc.), United States Bankruptcy Court for the North-
11 ern District of California, Adv. P. No. 07-05082 (Docket No. 1).

12 29. Defendants' Motion to Dismiss, SonicBlue Claims LLC v. Portside Growth & Op-
13 portunity Fund (In re SonicBlue Inc.), United States Bankruptcy Court for the Northern District of
14 California, Adv. P. No. 07-05082 (Docket No. 12).

15 30. Opposition to Defendants' Motion to Dismiss, SonicBlue Claims LLC v. Portside
16 Growth & Opportunity Fund (In re SonicBlue Inc.), United States Bankruptcy Court for the North-
17 ern District of California, Adv. P. No. 07-05082 (Docket No. 40).

18 31. Order Denying Motion to Dismiss Adversary Proceeding, SonicBlue Claims LLC v.
19 Portside Growth & Opportunity Fund (In re SonicBlue Inc.), United States Bankruptcy Court for
20 the Northern District of California, Adv. P. No. 07-05082 (Docket No. 49).

21 32. Transcript of Proceedings, September 27, 2007, SonicBlue Claims, LLC v. Portside
22 Growth & Opportunity Fund (In re SonicBlue Inc.), United States Bankruptcy Court for the North-
23 ern District of California, Adv. P. No. 07-05082 (Docket No. 51).

24 33. Notice of Appeal, In re SonicBlue Inc., United States District Court for the Northern
25 District of California, Case No. C-07-02553 RMW (Docket No. 1).

26 34. Chapter 11 Trustee's Motion to Dismiss Appeal, In re SonicBlue Inc., United States
27 District Court for the Northern District of California, Case No. C-07-02553 RMW (Docket No. 14).

28

1 35. Opposition of Pillsbury Winthrop Shaw Pittman LLP to U.S. Trustee's Motion to
2 Disqualify Pillsbury, Vacate Employment Order, and Require Disgorgement of Attorneys' Fees, In
3 re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
4 03-51775 (Docket No. 2182) (ADR, Ex. 37).

5 36. Appointment of Committee of Unsecured Creditors, In re SonicBlue Inc., United
6 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
7 26) (ADR, Ex. 1).

8 37. First Amended Appointment of Committee of Unsecured Creditors, In re SonicBlue
9 Inc., United States Bankruptcy Court for the Northern District of California, Case No. 03-51775
10 (Docket No. 119) (ADR, Ex. 6).

11 38. Second Amended Appointment of Committee of Unsecured Creditors, In re
12 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
13 03-51775 (Docket No. 528) (ADR, Ex. 8).

14 39. Declaration of Bruce Bennett in Support of Debtors' Emergency Motion for Order
15 (1) Establishing Notice, Sales and Bidding Procedures for Sale of Substantially All of the Debtors'
16 Product Lines Free and Clear of All Liens, Claims, and Encumbrances; (2) Authorizing The As-
17 sumption and Assignment, or Rejection of Certain Executory Contracts and Unexpired Leases in
18 Connection with Asset Sale, and (3) Setting Hearing on Sale of Assets on Shortened Notice, In re
19 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
20 03-51775 (Docket No. 28) (ADR, Ex. 2).

21 40. Notice of Appearances and Request for Notices and Services of Papers, In re
22 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
23 03-51775 (Docket No. 43) (ADR, Ex. 3).

24 41. Application of the Official Committee of Unsecured Creditors to Employ Levene,
25 Neale, Bender, Rankin, & Brill L.L.P. as Bankruptcy Counsel, In re SonicBlue Inc., United States
26 Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 63)
27 (ADR, Ex. 4).

28

1 42. Declaration of Ron Bender in Support of Application of Official Committee of Un-
2 secured Creditors to Employ Levene, Neale, Bender, Rankin & Brill L.L.P. as Bankruptcy Counsel,
3 In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case
4 No. 03-51775 (Docket No. 64) (ADR, Ex. 5).

5 43. Stipulation Providing Relief from the Automatic Stay to Senior Noteholders, Filed
6 7/14/03, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
7 nia, Case No. 03-51775 (Docket No. 334) (ADR, Ex. 7).

8 44. Stipulation Providing Relief from Automatic Stay to Senior Noteholders, Filed
9 10/16/03, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Cali-
10 fornia, Case No. 03-51775 (Docket No. 545) (ADR, Ex. 10).

11 45. Declaration of Ron Bender in Response of the Official Committee of Creditors
12 Holding Secured Claims to (1) the Motion by the Office of the United States Trustee Seeking the
13 Appointment of a Chapter 11 Trustee and (2) the Motion by SBC seeking to Convert These Chap-
14 ter 11 Cases to Chapter 7, In re SonicBlue Inc., United States Bankruptcy Court for the Northern
15 District of California, Case No. 03-51775 (Docket No. 2185) (ADR, Ex. 39).

16 46. Response to Motion to Convert Chapter 11 Case to a Case Under Chapter 7, In re
17 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
18 03-51775 (Docket No. 2181) (ADR, Ex. 36).

19 47. Transcript of Hearing Held on March 19, 2007, In re SonicBlue Inc., United States
20 Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2226)
21 (ADR, Ex. 50).

22 48. Objection of Debtor SonicBlue Inc. to Duplicate Proofs of Claim of Via Technolo-
23 gies, Inc. and S3 Graphics Co., Ltd. And Debtors' Second Amended Adversary Complaint for Af-
24 firmative Relief, SonicBlue Claims LLC v. Via Technologies, Inc. (In re SonicBlue Inc.), United
25 States Bankruptcy Court for the Northern District of California, Adv. P. No. 04-05556 (Docket No.
26 42).

1 49. Ex Parte Application to File Debtors' Motion for Approval of Settlement of VIA
2 and Intel Litigation Under Seal, In re SonicBlue Inc., United States Bankruptcy Court for the
3 Northern District of California, Case No. 03-51775 (Docket No. 1950).

4 50. Order Approving Ex Parte Application to File Debtors' Motion For Approval of
5 Settlement of VIA and Intel Litigation Under Seal, In re SonicBlue Inc., United States Bankruptcy
6 Court for the Northern District of California, Case No. 03-51775 (Docket No. 1951).

7 51. Notice of Debtors' Motion for Approval of Settlement of VIA and Intel Litigation,
8 In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case
9 No. 03-51775 (Docket No. 1955).

10 52. Notice of Filing of Redacted Copy of Memorandum of Points and Authorities in
11 Support of Debtors' Motion for Approval of Settlement of VIA and Intel Litigation, In re
12 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
13 03-51775 (Docket No. 2057).

14 53. Transcript of Hearing Held on January 23, 2007 re Approval of Disclosure State-
15 ment, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
16 Case No. 03-51775 (Docket No. 2136) (ADR, Ex. 20).

17 54. Disclosure Statement for Liquidating Plan of Reorganization Dated as of December
18 15, 2006, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Cali-
19 fornia, Case No. 03-51775 (Docket No. 2047) (ADR, Ex. 11).

20 55. Objection to Joint Disclosure Statement, In re SonicBlue Inc., United States Bank-
21 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2091) (ADR,
22 Ex. 13).

23 56. Supplemental Objection to Joint Disclosure Statement Dated January 18, 2007, In re
24 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
25 03-51775 (Docket No. 2115) (ADR, Ex. 17).

26 57. Objection to Proposed Disclosure Statement Dated January 18, 200, In re SonicBlue
27 Inc., United States Bankruptcy Court for the Northern District of California, Case No. 03-51775
28 (Docket No. 2116) (ADR, Ex. 18).

1 58. Submission of Preliminary Status Report and Request for Continuance of Deadline
2 for Submission of Final Status Report and of Disclosure Statement, In re SonicBlue Inc., United
3 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
4 2138) (ADR, Ex. 21).

5 59. Transcript of Hearing Held on February 15, 2007 re a) Motion for Authority to Dis-
6 close Confidential Information to People Who are Not Parties to the VIA/Intel Confidentiality
7 Agreement by Official Committee of Creditors Holding Unsecured Claims; b) Response by VIA
8 Technologies, Inc., In re SonicBlue Inc., United States Bankruptcy Court for the Northern District
9 of California, Case No. 03-51775 (Docket No. 2176) (ADR, Ex. 34).

10 60. Transcript of Hearing Held on May 4, 2007 re a) Motion for Clarification, or in the
11 Alternative, for Leave to File a Motion for Reconsideration by Portside Growth & Opportunity
12 Fund, Smithfield Fiduciary LLC, and Citadel Equity Fund, Ltd.; b) Amended Opposition by Sonic
13 Blue Claims, LLC, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District
14 of California, Case No. 03-51775 (Docket No. 2303) (ADR, Ex. 61).

15 61. Reply to SonicBlue Claims LLC's Response to Preliminary Status Report, In re
16 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
17 03-51775 (Docket No. 2150) (ADR, Ex. 27).

18 62. First Amended Disclosure Statement Describing First Amended Liquidating Plan of
19 Reorganization, Dated as of January 18, 2007, In re SonicBlue Inc., United States Bankruptcy
20 Court for the Northern District of California, Case No. 03-51775 (Docket No. 2103) (ADR, Ex. 14).

21 63. Supplemental Document in Support of Motion to Vacate, In re SonicBlue Inc.,
22 United States Bankruptcy Court for the Northern District of California, Case No. 03-51775
23 (Docket No. 2558).

24 64. Stipulated Protective Order, In re SonicBlue Inc., United States Bankruptcy Court
25 for the Northern District of California, Case No. 03-51775 (Docket No. 529) (ADR, Ex. 9).

26 65. Reply Brief in Support of Motion for Clarification, or in the Alternative, for Leave
27 to File a Motion for Reconsideration, In re SonicBlue Inc., United States Bankruptcy Court for the
28 Northern District of California, Case No. 03-51775 (Docket No. 2265) (ADR, Ex. 54).

1 66. Appellants Designation of Items to be Included on the Record on Appeal and
2 Statement of Issues on Appeal, In re SonicBlue Inc., United States Bankruptcy Court for the
3 Northern District of California, Case No. 03-51775 (Docket No. 2308).

4 67. Reply by Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and
5 Citadel Equity Fund Ltd. to SonicBlue Claims LLC's Reply to Opposition to the U.S. Trustee's
6 Motion to Disqualify Pillsbury, In re SonicBlue Inc., United States Bankruptcy Court for the
7 Northern District of California, Case No. 03-51775 (Docket No. 2202) (ADR, Ex. 46).

8 Under Federal Rule of Evidence 201, a court may take judicial notice of "facts that are not
9 subject to reasonable dispute in that they are either (1) generally known within territorial jurisdic-
10 tion of the trial court or (2) capable of accurate and ready determination by resort to sources whose
11 accuracy cannot reasonably be questioned." Biggs v. Capital Factors, Inc., 120 F.3d 268 (9th Cir.
12 1997). This Court may take judicial notice of Exhibits 1-67 because they are capable of accurate
13 and ready determination since they are from the files of this Court as well as the United States
14 Bankruptcy Court for the Northern District of California. See Duke Energy Trading & Mktg.,
15 L.L.C. v. Davis, 267 F.3d 1042, 1048 n.3 (9th Cir. 2001) (Ninth Circuit took judicial notice of fil-
16 ings made in related bankruptcy proceeding). Furthermore, the exhibits "consist of court records,
17 the accuracy of which cannot reasonably be questioned." Esiomeme v. United Airlines, Inc., 369
18 B.R. 531, 1-2 (N.D. Cal. 2007) (granting defendant's request for judicial notice of debtor's volun-
19 tary bankruptcy petition and bankruptcy court's orders confirming debtor's plan of reorganization).

1 Accordingly, the Senior Noteholders respectfully request that this Court take judicial notice
2 of Exhibits 1-67.¹

3 Dated: November 20, 2007

STROOCK & STROOCK & LAVAN LLP

4
5 By: /s/ Alan Z. Yudkowsky

Lewis Kruger

6 Attorneys for Portside Growth & Opportunity Fund,
Smithfield Fiduciary LLC, and
7 Citadel Equity Fund Ltd.

8
9 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

10 By: /s/ Glenn Walter

11 Glenn Walter

Attorneys for Citadel Equity Fund Ltd.

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27 ¹ Any party that requires a copy of the exhibits to this Request for Judicial Notice
28 may request such copies from counsel to the Senior Noteholders, and will be provided such copies
free of charge.

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1 **I. INTRODUCTION**

2 Appellants Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and Citadel
3 Equity Fund Ltd. (collectively, the "Senior Noteholders") hereby oppose (the "Opposition") the
4 Motion to Dismiss Appeal (the "Motion") filed by the Chapter 11 Trustee and submit this memo-
5 randum of points and authorities in support of the Opposition as well as their Cross-Motions for a
6 Limited Stay of Proceedings and/or to Withdraw the Reference of Chapter 11 Cases (the "Cross-
7 Motions").

8 Principally at issue is a March 26, 2007 opinion and order of the United States Bankruptcy
9 Court for the Northern District of California (the "Bankruptcy Court") that, among other things,
10 appointed a Chapter 11 Trustee in an effort to correct what the Bankruptcy Court termed "the com-
11 plete breakdown of creditor confidence" stemming from a conflict of interest suffered by the debt-
12 ors' attorneys, Pillsbury, Winthrop, Shaw Pittman LLP f/k/a Pillsbury Winthrop LLP ("Pillsbury")
13 (the "First Opinion"). (Appellants Designation of Record ("ADR"), Ex. 49 at 1 [Docket No.
14 2220];¹ Request for Judicial Notice ("RJN"), Ex. 7 at 1.) At the time the Chapter 11 Trustee was
15 appointed, it was suggested that this conflict of interest caused Pillsbury to assist in brokering a set-
16 tlement agreement containing a term that was favorable to the Senior Noteholders.

17 In essence then, the "breakdown" arose in connection with the manner in which the settle-
18 ment was negotiated, proposed, and ultimately approved in the Bankruptcy Court. Importantly,
19 however, no party-in-interest has claimed that the settlement was not in the best interests of the es-
20 tates. The only party claiming to be harmed by the settlement is a party who had the benefit of full
21 disclosure and representation by counsel in connection with the allegedly offending settlement pro-
22 vision, and the allegedly offending settlement provision did not cost the debtors' estates anything
23 as it was in the nature of an agreed clarification of a pre-petition agreement.

24 Also noteworthy is the uncontroverted circumstances of the conflict of interest: it stemmed
25 from a dispute between Pillsbury and the Senior Noteholders that arose more than three months
26 *after* the allegedly offending settlement provision was proposed (and approximately one year after

27 ¹ Unless otherwise indicated, all docket entries referenced herein are on the record in the
28 Chapter 11 cases pending before the Bankruptcy Court, Case No. 03-51775.

1 the provision was agreed to in principle) and almost three months *after* it was agreed to by the party
2 allegedly harmed by it. And the actual conflict of interest touched only *one* of the debtors' two law
3 firms that advised the debtors in connection with the settlement. No one has suggested, nor can
4 they, that the second law firm ever suffered under any conflict of interest.

5 No party-in-interest – not the Senior Noteholders, the non-debtor party to the settlement, the
6 debtors (through either law firm), or the initial official committee of unsecured creditors – affirma-
7 tively disclosed the allegedly offending settlement provision, which only affected the Senior Note-
8 holders and the non-debtor party to the settlement, in a settlement that everyone still agrees was in
9 the best interests of the estate. While the allegedly offending settlement provision may not have
10 been specifically highlighted or called to the Bankruptcy Court's attention, *it was included in pa-*
11 *pers submitted to the Bankruptcy Court.* With perfect hindsight, of course, it would be foolish to
12 dispute that this settlement term should have been affirmatively disclosed. The fact that so many
13 parties failed to make an affirmative disclosure, however, strongly suggests that the failure was in-
14 advertent, and the fact that the settlement remains undisputedly a "good deal" confirms that no
15 harm was done.

16 Against this backdrop (but without consideration of any of the foregoing undisputed cir-
17 cumstances), the Bankruptcy Court appointed a Chapter 11 Trustee to investigate the facts and cir-
18 cumstances surrounding the settlement, which appointment the Senior Noteholders did not oppose.
19 In its opinion, the Bankruptcy Court conceded that the Senior Noteholders' motive in connection
20 with the settlement was "not known." (RJN, Ex. 7 at 17.) Yet in the same opinion, the Bankruptcy
21 Court purported to find facts regarding the alleged, but unsubstantiated, behavior of the Senior
22 Noteholders' counsel that demonstrated improper motives. (*Id.*) And in the later, related clarifica-
23 tion opinion, the Bankruptcy Court erroneously concluded that there was an "appearance of con-
24 cealment" and that the participation by the largest creditors in the single most important settlement
25 to the estates was "unusual" (the "Clarification Denial Order" and, collectively with the First Opin-
26 ion, the "Orders"). (ADR, Ex. 57 at 3-4 [Docket No. 2279]; RJN, Ex. 11 at 3-4.)

1 Because these, and other, findings in the Orders were unnecessary to the motions before the
2 Bankruptcy Court, clearly erroneous, and unsupported by the record, the Senior Noteholders filed
3 this appeal (the "Appeal"). The Chapter 11 Trustee has moved to dismiss the Appeal on the
4 grounds that this Court does not possess jurisdiction to review factual findings contained in the Or-
5 ders where the Senior Noteholders have not challenged the results reached in the Orders. (Mot. at
6 2, 6-7.) Although the Chapter 11 Trustee correctly states the general rule that only a party "ag-
7 grieved" by a judgment or order may appeal therefrom, the Ninth Circuit has recognized prudential
8 exceptions to the "prevailing party" rule, and the Senior Noteholders satisfy those exceptions.
9 Therefore, the Senior Noteholders are deemed "aggrieved" by the Orders and have standing to ap-
10 peal. Specifically, because the Orders contain discussions of issues that are immaterial to the mo-
11 tions that were before the Bankruptcy Court, the Senior Noteholders may seek reformation of the
12 Orders. Furthermore, for the reasons set forth herein, the Orders may be appealed because they
13 could potentially serve as the basis for collateral estoppel in subsequent litigation.

14 Following entry of the Orders and the filing of this Appeal, the Bankruptcy Court again re-
15 lied upon the disputed findings of "fact," without any evidentiary hearing, to reconstitute the credi-
16 tors committee, and these same findings have recently spawned two separate motions for relief
17 from the order approving the settlement. Because the Bankruptcy Court has more than once relied
18 on certain factual findings in granting relief, however, the Senior Noteholders also file concurrently
19 herewith the Cross-Motions.

20 The Senior Noteholders have no opposition to a full and fair investigation of their conduct
21 in these bankruptcy cases; however, to date, the Senior Noteholders have had no opportunity to be
22 heard. The Senior Noteholders file the accompanying Cross-Motions, therefore, to ensure they
23 have the opportunity to present a full and accurate picture regarding their conduct and, perhaps
24 more importantly, to avoid the waste of estate resources in the underlying Chapter 11 cases.

II. STATEMENT OF FACTS

A. The Senior Noteholders And The Debtor

In April 2002, in the face of mounting economic pressure caused by faltering finances, SONICblue, Incorporated (the “Debtor” or “SONICblue”),² negotiated the issuance of senior secured subordinated convertible debentures (the “Senior Notes”) with the Senior Noteholders in the amount of \$75 million, pursuant to an indenture dated as of April 22, 2002 (the “Indenture”).³ (ADR, Exs. 20 at 32:3-11 [Docket No. 2136], 37, Declaration of Ana N. Damonte (“Damonte Declaration”) at ¶¶ 2-9 [Docket No. 2182]; RJN, Exs. 53 at 32:3-11, 35 at ¶¶ 2-9.) Significantly for this case, one provision of the Indenture provided that the Senior Notes were subordinate to certain other obligations (“Senior Indebtedness” and the “Senior Indebtedness Provision”), including “[a]ll indebtedness of [SONICblue] due and owing to Via Technologies, Inc. [(“VIA”)] in an aggregate principal amount not to exceed \$15,000,000 or the equivalent thereof in any other currency or composite currency.”⁴ (ADR, Ex. 37, Indenture, at Section 1.1 (g) [Docket No. 2182]; RJN, Ex. 35, Indenture, at Section 1.1(g).)

B. The Bankruptcy Cases

Just ten months after it issued the Senior Notes, due to the continued deterioration of the Debtors’ businesses, it became necessary for the Debtors to file for bankruptcy protection. On March 21, 2003 (the “Petition Date”), therefore, each of the Debtors commenced a Chapter 11 case by filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the Bankruptcy Court. These Chapter 11 cases were procedurally consolidated for administrative purposes, and these petitions were assigned to United States Bankruptcy Judge Marilyn Morgan in case numbers 03-51775-035178-MM (the “Bankruptcy Cases”). That same day, the Office of the United States Trustee (the “U.S. Trustee”) appointed the Senior Note-

² The Debtor, a Delaware corporation formerly known as S3 Inc., is a consumer electronics company. Debtors ReplayTV, Inc., Sensory Science Corp., and Diamond Multimedia Systems Inc. are wholly-owned subsidiaries of SONICblue. Collectively, these entities are the debtors (the “Debtors”) herein.

³ Pillsbury was the Debtor’s counsel during these negotiations. It had been the Debtor’s general corporate and litigation counsel for many years.

⁴ In 2001, VIA and the Debtor formed a joint venture—S3 Graphics Co., Ltd. (“S3G”).

holders to the initial Official Committee of Unsecured Creditors (the “Initial Creditors Committee”). (ADR, Ex. 1 [Docket No. 26]; RJN, Ex. 36.) Each of the Senior Noteholders filed a proof of claim (the “Indenture Claims”) related to the Senior Notes.

Pillsbury again was retained by the Debtors, and Hennigan, Bennett & Dorman LLP (“HBD”) represented the Senior Noteholders in connection with the Bankruptcy Cases. Levene, Neale, Bender, Rankin & Brill LLP (“LNBRB”) was appointed as counsel for the Initial Creditors Committee.

1. The Initial Creditors Committee

In addition to being appointed to the Initial Creditors Committee, the U.S. Trustee included the Senior Noteholders in all subsequent amended appointments to the Initial Creditors Committee. (ADR, Exs. 6 [Docket No. 119], 8 [Docket No. 528]; RJN, Exs. 36, 37, 38.) At first, all eight members of the Initial Creditors Committee participated actively, (ADR, Ex. 39, Declaration of Ron Bender (“Bender Declaration”) at ¶ 24 [Docket No. 2185]; RJN, Ex. 45 at ¶ 24), but after 2003, only the Senior Noteholders, Matsushita Kotobuki Electronics Sales of America LLC, and Matsushita Kotbuki Electronics Industries were truly involved, (RJN, Exs. 45 at ¶¶ 24-27, 53 at 5:15-6:6).

From the time of their appointment through the filing of this appeal, the Senior Noteholders were openly active members of the Initial Creditors Committee. The other key actors in the Bankruptcy Cases – including, for example, the Debtors, Pillsbury, VIA, and Ron Bender of LNBRB – were well aware that the Senior Noteholders were members of the Initial Creditors Committee and that Bruce Bennett of HBD represented the Senior Noteholders as such—*not the Initial Creditors Committee*. Every document contained in the record supports this view, and that they functioned as separate and distinct parties. (See, e.g., ADR, Exs. 2 at ¶ 4 [Docket No. 28]; 3 at 1-2 [Docket No. 43]; 4 at ¶¶ 11-12 [Docket No. 63]; 5 at ¶¶ 7-8 [Docket No. 64]; 7 at 1 [Docket No. 334]; 10 at 1 [Docket No. 545]; RJN, Ex. 35, Declaration of Albert J. Boro (“Boro Decl.”) at ¶¶ 10, 14 (“Following that, we spoke with Mr. Bennett, counsel for the Senior Noteholders”), 17-18, 25; RJN, Exs. 45, Bender Decl. at ¶ 4, 40 at 1-2, 41 at ¶¶ 11-12, 42 at ¶¶ 7-8, 43 at 1, 44 at 1, 45 at ¶¶ 13 n.1,

27.)⁵ What is more, as made clear by the Senior Noteholders, “[n]o issues put before the [Initial] Creditors’ Committee have been determined by the Senior Noteholders alone.” (ADR, Ex. 36 at 2 [Docket No. 2181]; RJN, Ex. 46 at 2.) Finally, the Senior Noteholders never participated in an Initial Creditors Committee vote “relating to an issue in which the senior noteholders had a distinct interest” [ADR, Ex. 50 at 37:17-20 [Docket No. 2226]; RJN, Ex. 47 at 37:17-20.)

2. The VIA Litigation And The Intel Motion

Since its formation, VIA and the Debtor have had a contentious relationship regarding S3G—their joint venture. On June 6, 2003, Intel Corporation (“Intel”) filed a motion seeking, *inter alia*, to terminate a patent licensing agreement with the Debtor related to its use by S3G (the “Intel Motion”). Since Pillsbury had previously represented Intel, the Debtor hired O’Melveny & Meyers LLP (“OMM”) as independent, special litigation counsel respecting the Intel Motion. (RJN, Ex. 35, Boro Decl. at ¶ 4.) Then, on July 17, 2003, VIA and S3G filed duplicate proofs of claim for \$70 million in the Bankruptcy Cases based on an alleged breach of their joint venture agreement, involving the patent licensing agreement that was the subject of the Intel Motion. (RJN, Ex. 35, Boro Decl. at ¶ 2.) The Debtor objected to these claims, and subsequently, on December 21, 2004, the Debtor filed an adversary complaint against VIA and S3G (the “VIA Litigation”). (Appellee’s Designation of Record (“APDR”), Ex. 74 [Docket No. 42]; RJN, Ex. 48.)

3. The VIA Settlement Negotiations

According to the Bankruptcy Court, the resolution of the Intel Motion and the settlement of the duplicate claims were the major impediments towards bringing the Bankruptcy Cases to a con-

⁵ For example, on October 9, 2003, the parties involved in the VIA Litigation and Intel Motion described below entered into a Stipulated Protective Order (the “Protective Order”) that was signed by the Bankruptcy Court on October 17, 2003. It is clear from the face of the Protective Order that these parties viewed the Senior Noteholders and the Initial Creditors Committee as separate and distinct entities to be covered by the Protective Order. Significantly, the attorneys from LNBRB and HBD were separately given designations to view documents under the Protective Order. (ADR, Ex. 9 at 3-5 [Docket No. 529]; RJN, Ex. 64 at 3-5.) Finally, the Protective Order was signed by counsel for the Senior Noteholders as “Attorneys for the Senior Debtholders,” and the Protective Order was separately executed by counsel for the Initial Creditors Committee. (RJN, Ex. 64 at 12.)

clusion.⁶ (RJN, Ex. 7 at 17 (“During the past year and a half, SONICblue’s litigation against VIA and [S3G] has been the main roadblock to the proposal of a plan and the conclusion of this case.”).) Settlement negotiations between the parties began in August 2005 (the “VIA Settlement Negotiations”). HBD, and by extension Mr. Bennett, were involved in the VIA Settlement Negotiations solely as counsel for the Senior Noteholders. (RJN, Ex. 35, Boro Decl. at ¶¶ 10, 14, 17-18, 25.) There is nothing in the record to indicate that any party involved in the VIA Settlement Negotiations somehow thought otherwise. (See, e.g., RJN, Ex. 35, Boro Decl. at ¶ 10.) Although an agreement was reached in principle in September 2005, it was not until late September 2006 that the VIA Settlement Negotiations produced a finalized agreement (the “VIA Settlement Agreement”). (APDR, Exs. 63 [Docket No. 1950], 64 [Docket No. 1951], 65 [Docket No. 1955], 67 [Docket No. 2057]; RJN, Exs. 49-52.)

The first settlement meeting occurred on August 11, 2005, and was attended by representatives of VIA and the Debtor. (RJN, Ex. 35, Boro Decl. at ¶ 9.) There, VIA contended that its allowed claim should be \$42.5 million. The Debtor countered that an allowed claim of \$6 million might be acceptable, but that the Initial Creditors Committee needed to approve before a formal offer could be made. (RJN, Ex. 35, Boro Decl. at ¶ 9.) After the attorneys for the Initial Creditors Committee consulted with Mr. Bennett on behalf of the Senior Noteholders, they authorized the Debtor to counter with a settlement offer of \$6 million. (RJN, Ex. 35, Boro Decl. at ¶ 10.) Pillsbury believed that the consent of the Senior Noteholders to the terms of any settlement was essential to court approval.⁷ (RJN, Ex. 35, Boro Decl. at ¶ 11.) And Mr. Bennett confirmed on August 30, 2005 that the Senior Noteholders would support a \$6 million counteroffer. (RJN, Ex. 35, Boro Decl. at ¶ 10.)

⁶ According to the Bankruptcy Court, “[t]his litigation was also significant because termination of [the intellectual property rights] would arguably trigger the liquidated damages provision of the joint venture agreement [between VIA and the Debtor].” (RJN, Ex. 7 at 7.)

⁷ At both the August and September 2005 settlement meetings, the parties discussed that VIA’s claim would be given the same priority as other general unsecured creditors. (RJN, Ex. 35, Boro Decl. at ¶ 15.)

1 Following this meeting, Pillsbury participated in settlement discussions with the Debtor's
 2 independent, special litigation counsel, OMM, LNBRB for the Initial Creditors Committee, and
 3 Mr. Bennett on behalf of the Senior Noteholders. (RJN, Ex. 35, Boro Decl. at ¶ 11.) Based on
 4 those discussions, Pillsbury concluded that a global settlement that included Intel was necessary
 5 and that a settlement amount of less than \$25 million would be acceptable to the Initial Creditors
 6 Committee. (RJN, Ex. 35, Boro Decl. at ¶ 11.) On September 12, 2005, counsel for VIA sent
 7 Pillsbury a draft settlement term sheet proposing that VIA be allowed a general unsecured claim in
 8 the amount of \$27.5 million. (RJN, Ex. 35, Boro Decl. at ¶ 12.)

9 In a subsequent settlement meeting held on September 15, 2005,⁸ VIA and S3G reduced
 10 their settlement demand to \$19 million. (RJN, Ex. 35, Boro Decl. at ¶ 14.) Following that meet-
 11 ing, Pillsbury spoke with Mr. Bennett who indicated that his clients would only support an allowed
 12 claim of \$10 million. (RJN, Ex. 35, Boro Decl. at ¶ 14.) After consulting with the Debtor, it au-
 13 thorized a \$10 million counteroffer. (RJN, Ex. 35, Boro Decl. at ¶ 14.) Later that day, counsel for
 14 the various parties tentatively agreed to a settlement amount of \$12.5 million subject to client and
 15 creditor approval. (RJN, Ex. 35, Boro Decl. at ¶ 14.) On September 20, 2005, Mr. Bennett con-
 16 firmed the Senior Noteholders' agreement to a \$12.5 million allowed claim; provided that the set-
 17 tlement included, *inter alia*, a provision that the VIA/S3G allowed claim (the "VIA/S3G Allowed
 18 Claim") be neither senior nor junior to other general unsecured claims. (RJN, Ex. 35, Boro Decl. at
 19 ¶ 17.) And the Senior Noteholders did so, because, under the transactional facts fully known to
 20 everyone, the VIA/S3G Allowed Claim would not constitute Senior Indebtedness. (See RJN, Exs.
 21 35, Boro Decl. at ¶¶ 15-17, 45 at ¶ 40.)

22 In a conference call that same day with VIA and S3G, the Debtor accepted the settlement
 23 terms so long as the VIA/S3G Allowed Claim be neither senior nor junior to other general unse-
 24 cured claims. (RJN, Ex. 35, Boro Decl. at ¶ 17.) VIA and S3G did not object to this language and
 25

26 ⁸ At the time of the September 15, 2005 settlement meeting, Mr. Boro was aware of the Senior
 27 Indebtedness Provision contained in the Senior Debenture, (RJN, Ex. 35, Boro Decl. at ¶ 15), and
 28 he came to the conclusion that the Senior Indebtedness Provision contemplated a loan that had
 never occurred, (RJN, Ex. 35, Boro Decl. at ¶ 17). This provision was not discussed at the Sep-
 tember 15, 2005 meeting. (RJN, Ex. 35, Boro Decl. at ¶ 15.)

1 “wanted to include language that Defendants could decide how to allocate the allowed claim
2 among Defendants.” (RJN, Ex. 35, Boro Decl. at ¶ 17.) On September 22, 2005, the “neither sen-
3 ior nor junior” language again was discussed by Pillsbury with counsel for VIA and S3G. (RJN,
4 Ex. 35, Boro Decl. at ¶ 17.) Counsel for VIA and S3G “posed questions about subordination of the
5 claims of the Senior Noteholders and other creditors, and expressed concern that other creditors not
6 unduly benefit at their clients’ expense, but they nevertheless agreed that their [allowed] claim was
7 neither senior nor junior to other general unsecured claims.” (RJN, Ex. 35, Boro Decl. at ¶ 17.)

8 On September 26, 2005, counsel for the Debtor and VIA finalized a draft of the proposed
9 settlement term sheet, which included the following provision:

10 Claimants shall jointly hold a single, allowed general unsecured
11 claim in the Chapter 11 case of SONICblue Inc., which claim shall be
12 afforded the benefits and priority of SONICblue’s other allowed gen-
13 eral unsecured claims and shall be neither senior nor junior to any
14 other allowed general unsecured claim, in the amount of \$12.5 mil-
15 lion.

16 (RJN, Ex. 35, Boro Decl. at ¶ 18.)

17 Mr. Boro sent the proposed term sheet to Mr. Bennett on behalf of the Senior Noteholders
18 and to LNBRB on behalf of the Initial Creditors Committee on September 27, 2005. (RJN, Ex. 35,
19 Boro Decl. at ¶ 18.) In a conference call held later that day, the Initial Creditors Committee ap-
20 proved the settlement terms. (RJN, Ex. 35, Boro Decl. at ¶ 18.) Apparently, finalizing the settle-
21 ment between the Debtor, VIA, and S3G was delayed and made complicated by the difficulty in
22 reaching a resolution with Intel. (RJN, Ex. 35, Boro Decl. at ¶ 19.) Thus, the initial draft of a set-
23 tlement agreement was not prepared until January 25, 2006, when OMM circulated a draft that con-
24 tained a provision dealing with the VIA/S3G Allowed Claim that read substantially the same as the
25 one in the September 26, 2005 term sheet. (RJN, Ex. 35, Boro Decl. at ¶ 19.)

26 In April or early May 2006, Pillsbury proposed that the settlement agreement include lan-
27 guage specifically stating that the VIA/S3G Allowed Claim was not “Senior Indebtedness” as set
28 forth in the Senior Notes. (RJN, Ex. 35, Boro Decl. at ¶ 20.) Then, on May 12, 2006, OMM circu-
lated a revised draft with the following language added:

1 Claimants and the Debtor agree that the Allowed Claim is not, and
 2 shall not be treated as, "Senior Indebtedness" under the terms of the
 3 Debtor's Indenture, dated as of April 22, 2002, for the 7-¾ Secured
 Senior Subordinated Convertible Debentures due 2005.

4 (the "Waiver Provision") (RJN, Ex. 35, Boro Decl. at ¶ 17.) At a June 1, 2006 settlement meeting,
 5 the parties discussed proposed language waiving any claim that the settlement amount constituted
 6 Senior Indebtedness under the Senior Notes. (RJN, Ex. 35, Boro Decl. at ¶ 23.) Stating that it was
 7 aware of the Senior Indebtedness Provision and understood that it related to a loan that never oc-
 8 curred, VIA agreed to that limitation. (RJN, Ex. 35, Boro Decl. at ¶ 23.) Substantially the same
 9 language was included in a later revised draft circulated on June 16, 2006 and in the final VIA Set-
 10 tlement Agreement. (RJN, Ex. 35, Boro Decl. at ¶ 24.)

11 Therefore, pursuant to the VIA Settlement Agreement, VIA and S3G agreed, *inter alia*, to
 12 settle in exchange for a general unsecured allowed claim of \$12.5 million that was not "Senior In-
 13 debtedness" as described in the Senior Notes. (RJN Ex. 35, Settlement Agreement, at § 3.) On Oc-
 14 tober 10, 2006, the Debtor filed a motion to approve the VIA Settlement Agreement, which was
 15 granted on October 31, 2006. (APDR, Ex. 66 [Docket No. 1981]; RJN, Exs. 49-52.)

16 4. The Original Issue Discount And The 2002 Opinion Letter

17 As counsel for the Debtor during the negotiations for the Senior Notes, Pillsbury issued an
 18 opinion letter to the Senior Noteholders regarding the enforceability of the Senior Notes (the "2002
 19 Opinion Letter"). (RJN, Ex. 35, Freeman Decl. at ¶ 5.) Later, in its capacity as counsel for the
 20 Debtor in the Bankruptcy Cases, Pillsbury was involved in evaluating possible objections to
 21 claims—including those of the Senior Noteholders. (RJN, Ex. 35, Declaration of William B.
 22 Freeman ("Freeman Declaration") at ¶ 6.) On July 20, 2006, Pillsbury informed the Senior Note-
 23 holders that their claim would be challenged as it was based on unamortized original issue discount
 24 and thus subject to disallowance under 11 U.S.C. § 502(b)(2) (the "OID Issue"). (RJN, Ex. 35,
 25 Freeman Decl. at ¶¶ 6-7.)

26 Mr. Bennett contacted Pillsbury, on behalf of the Senior Noteholders, on August 24, 2006
 27 to discuss the OID Issue and the 2002 Opinion Letter. (RJN, Ex. 35, Freeman Decl. at ¶ 7.) There-
 28 after, on September 5, 2006, HBD sent a letter to Pillsbury that demanded indemnification from

Pillsbury for any possible loss due to the OID Issue (the "Indemnification Demand") based on the 2002 Opinion Letter.⁹ (RJN, Ex. 35, Declaration of Craig A Barbarosh ("Barbarosh Decl.") at ¶ 14.) According to the Senior Noteholders, the 2002 Opinion Letter clearly took the position that the Senior Notes would not be affected or limited by applicable bankruptcy laws. (RJN, Ex. 35, Barbarosh Decl. at ¶ 11.) Pillsbury, in turn, maintained that the 2002 Opinion Letter did nothing of the sort. (RJN, Ex. 35, Barbarosh Decl. at ¶ 11.)

In response to the Indemnification Demand, Pillsbury immediately notified Mr. Bender that Pillsbury had a conflict. (RJN, Ex. 35, Barbarosh Decl. at ¶ 13.) Pillsbury then transferred the responsibility for handling the Senior Noteholders' claims to Mr. Bender and the Initial Creditors Committee. (ADR, Ex. 37, Freeman Decl. at ¶¶ 8-11.) Regardless of the 2002 Opinion Letter's meaning, Pillsbury's failure to properly disclose the conflict caused by the 2002 Opinion Letter (the "Conflict of Interest") led to its eventual disqualification and the cloud that has been cast over these Bankruptcy Cases. (RJN, Ex. 7 at 14-16.)

5. The Initial Disclosure Statement

On December 15, 2006, the Debtor and the Initial Creditors Committee jointly filed a disclosure statement. (ADR, Ex. 11 [Docket No. 2047]; RJN, Ex. 54.) On, January 11, 2007, Riverside Contracting, LLC and Riverside Claims, LLC (collectively, "Riverside") filed objections to that disclosure statement. (ADR, Exs. 13 [Docket No. 2091], 17 [Docket No. 2115]; RJN, Exs. 55-56.) While most of Riverside's objections were addressed by the filing of a First Amended Disclosure Statement (the "Amended Disclosure Statement"), (ADR, Ex. 14 [Docket No. 2103]; RJN, Ex. 62), on January 17, 2007, Riverside filed a supplemental objection (collectively with the original objections, the "Riverside Objections") and continued to object to what it described as "inadequate information relating to the [VIA Settlement Agreement] Without such information, creditors cannot make an intelligent and informed decision as to whether to accept or reject the Plan." (RJN,

⁹ Thus, the language in the VIA Settlement that related to the Waiver Provision was a part of the VIA Settlement Agreement several months before the OID Issue arose and the Senior Noteholders sent Pillsbury the Indemnification Demand.

Ex. 56 at 1-2.) On January 22, 2003, Argo Partners, Inc. ("Argo"),¹⁰ a claims trader, also filed objections based on what it portrayed as inadequate disclosure related to the VIA Settlement Agreement. (ADR, Ex. 18 at 2-3 [Docket No. 2116]; RJN, Ex. 57.)

On January 23, 2007, the Bankruptcy Court held a hearing to approve the Amended Disclosure Statement. (RJN, Ex. 53.) At this hearing, Mr. Bender addressed (among other issues) the constitution of the Initial Creditors Committee and that, as far as he was aware, VIA had acknowledged that the VIA/S3G Allowed Claim was not Senior Indebtedness under the Senior Notes.¹¹ (ADR, Ex. 20 at 5:3-6:24, 24:2-24:6; RJN, Ex. 53 at 5:3-6:24, 24:2-24:6.) Significantly, Mr. Bender consistently has maintained that the Initial Creditors Committee was very pleased with the VIA Settlement Agreement, (see, e.g., RJN, Exs. 45 at ¶ 45, 53 at 11:14-18), and that everyone recognized that the VIA Settlement Agreement was a very good deal, (see, e.g., RJN, Ex. 53 at 11:14-18). Based in large part on the issues raised in the Riverside Objections and by Argo, the Bankruptcy Court directed Mr. Bender to investigate the circumstances surrounding the VIA Settlement Negotiations and to file a status report, (RJN, Ex. 53 at 47:1-50:15), which he did on February 14, 2007, (ADR, Ex. 21 [Docket No. 2138]; RJN Ex. 58). At a February 15, 2007 hearing, where Mr. Bennett appeared on behalf of the Senior Noteholders, the Bankruptcy Court directed Mr. Bender to stop investigating the matter further. (ADR, Ex. 34 at 12:14-19 [Docket No. 2176]; RJN, Ex. 59 at 12:14-19).

6. The Orders

Various motions were filed in response to the questions raised by Pillsbury's failure to affirmatively disclose its conflict with the Senior Noteholders, the Waiver Provision, and the VIA Settlement Negotiations. The U.S. Trustee filed a Motion To Appoint Chapter 11 Trustee, Or In The Alternative Motion To Appoint Examiner (the "Trustee Motion") (ADR, Exs. 28 [Docket No.

¹⁰ Argo owns a 50% interest in SonicBlue Claims, LLC ("SB Claims")—also a claims trader. (ADR, Ex. 27 at 2 [Docket No. 2150]; RJN, Ex. 61.) SB Claims did not exist at the time Argo filed its objections. SB Claims, however, now is the successor-in-interest to certain rights of VIA and S3G under the VIA Settlement Agreement. (RJN, Ex. 45 at ¶ 5.)

¹¹ Mr. Bender was informed repeatedly by VIA that it knowingly waived any claim to Senior Indebtedness when it entered into the VIA Settlement Agreement. (RJN, Ex. 45 at ¶¶ 35, 45-47.)

2153], 30 [Docket No. 2168]; RJN, Exs. 2, 4), and a Motion To Disqualify Pillsbury Winthrop Shaw Pittman LLP, To Vacate Employment Order, And For Disgorgement Of Attorneys' Fees (the "Disqualification Motion"). (ADR, Ex. 29 [Docket No. 2163]; RJN, Ex. 3.) Not to be left out, SB Claims filed a Motion To Convert Case To Chapter 7 (the "Chapter 7 Motion"). (ADR, Exs. 31 [Docket No. 2171], 32 [Docket No. 2173]; RJN, Exs. 5-6.)

a) The First Opinion

The Bankruptcy Court held a hearing on March 19, 2007 to address these motions. (RJN, Ex. 47.) Mr. Bennett again appeared on behalf of the Senior Noteholders. (RJN, Ex. 47 at 6:19-21.) On March 26, 2007, the Bankruptcy Court issued the First Opinion, which appointed a Chapter 11 Trustee, declined to convert the case from Chapter 11 to Chapter 7, and disqualified Pillsbury. (RJN, Ex. 7.)

b) The Clarification Denial Order

On April 4, 2007, the Senior Noteholders filed a Motion For Clarification, Or In The Alternative, Leave To File A Motion For Reconsideration (the "Clarification Motion"). (ADR, Ex. 51 [Docket No. 2231]; RJN, Ex. 8.) The Clarification Motion sought "clarification or reconsideration of certain statements in the [First Opinion], which could be misconstrued as suggesting that the Court made certain factual findings or conclusions unnecessary to the decision of the motions before the Court and unsupported by the record." (RJN, Ex. 8 at 1.) Specifically, the Senior Noteholders were concerned that the following statements in the First Opinion could be misconstrued:

1. The rights to use Intel's graphics patents were so important that the joint venture agreement included a liquidated damages clause at article 5.6 entitling the joint venture and VIA each to damages of up to \$70 million if the joint venture were ever enjoined from using the Intel cross-license; and

2. Because the bondholders appear to have used their position on the committee to insert themselves into the settlement negotiations without revealing a hidden agenda, they may have breached their fiduciary duty to the unsecured creditor body. Whether their motive was simply to save litigation costs for the estate by avoiding future litigation over the priority of VIA's claim, or, instead, to assure a larger return on their individual investments is not known. In fact, as Bennett noted, he had never personally appeared in court until March 19, 2007. During the four years of this case, he has operated in the shad-

ows and, until January 23, 2007, it was not generally known to this court or the creditor body that the three senior bondholders were serving on the Committee (collectively, the "Findings").

(RJN, Ex. 8 at 1.)

After a hearing respecting the Clarification Motion on May 4, 2007, (ADR, Ex. 61 [Docket No. 2303]; RJN, Ex. 60), the Bankruptcy Court immediately issued its Clarification Denial Order denying the Clarification Motion. (ADR, Ex. 57 [Docket No. 2279]; RJN, Ex. 11.) The Bankruptcy Court began the Clarification Denial Order by stating: "Let there be no doubt that the words and findings of my [First Opinion] were carefully selected to respond to the issues then before the court" (RJN, Ex. 11 at 1.) The Bankruptcy Court then provided additional facts to support its characterization of the Senior Noteholders and Mr. Bennett in the First Opinion. Although Mr. Bennett was under no duty to volunteer information to Mr. Bender and Mr. Bender had described him as extremely cooperative during his investigation,¹² the Bankruptcy Court nonetheless found that "it does not appear that Bennett ever volunteered relevant information despite the ongoing investigation and Bender's active efforts to pursue answers." (RJN, Ex. 11 at 3.) The Bankruptcy Court concluded by stating that "[t]he appearance of concealment by the senior noteholders and Bennett was one of the grounds for the appointment of a trustee." (RJN, Ex. 11 at 4.)

Since his appointment, the Chapter 11 Trustee has undertaken a comprehensive investigation into: (1) the conduct of professionals and other fiduciaries in the Bankruptcy Proceedings prior to his appointment, including Pillsbury and LNBRB; and (2) the circumstances leading up to and surrounding the VIA Settlement Agreement (the "Trustee Investigation").

c) The Notice Of Appeal

In response to the Orders, the Senior Noteholders filed their Notice of Appeal on May 11, 2007. (ADR, Ex. 58 [Docket No. 2292]; RJN, Ex. 33.) The Senior Noteholders appeal the Orders

¹² According to Mr. Bender, Mr. Bennett did everything he was asked in connection with Mr. Bender's investigation. For example, Mr. Bender described Mr. Bennett as having "been extremely cooperative from the outset." (ADR, Ex. 21, Declaration of Ron Bender in Support of His Submission of Preliminary Status Report ("Bender Status Report Decl.") at ¶ 25 [Docket No. 2138]; RJN, Ex. 58 at ¶ 25.) Mr. Bender also stated that Mr. Bennett had made a complete document production and was scheduled to be deposed before Mr. Bender continued it to allow for a ruling on confidential documents. (RJN, Ex. 58 at ¶ 25.)

on the basis that the Bankruptcy Court: (1) mistakenly determined that VIA has a claim against the Debtor related to the loss of the use of the patent licensing agreement by S3G and the liquidated damages remedy for that loss (the "VIA Claim Issue"); and (2) mistakenly made conclusions regarding the role of the Senior Noteholders and their counsel during the VIA Settlement Negotiations (the "Senior Noteholders Issue," collectively with the VIA Claim Issue, the "Appellate Issues"). (RJN, Ex. 66 at 7 [Docket No. 2308].)

7. The Adversary Proceeding

SB Claims acquired the VIA/S3G Allowed Claim on April 27, 2007. This was, however, *after* all of the alleged improper conduct by Pillsbury and the Senior Noteholders had occurred. But it is this alleged conduct that forms the basis for the relief requested in the Adversary Proceeding and the Motions for Partial Modification of the Settlement Order described below. (RJN, Ex 28 at ¶ 5 [Adversary Proceeding Docket No. 1].) At the time, SB Claims was fully aware of the alleged conduct, and, in fact, acquired the VIA/S3G Allowed Claim specifically with the intent of seeking relief premised upon it. Indeed, the Claim Transfer Agreement itself recites that "[a] dispute has arisen in the Bankruptcy Cases as to the propriety of" VIA/[S3G's] acknowledgment that the [VIA/S3G Allowed Claim] is not Senior Indebtedness "and as to whether such [VIA/S3G Allowed Claim] is, or is not, 'Senior Indebtedness' under the Indenture," and that "[a] dispute also has arisen as to whether the provisions in the [VIA Settlement Agreement] were adequately disclosed to the Bankruptcy Court and other parties in interest." (RJN, Ex. 13, Claims Transfer Agreement, at 3 [Docket No. 2316].)¹³

On May 30, 2007, SB Claims filed an adversary proceeding, Case No. 07-05082, naming the Senior Noteholders as defendants (the "Adversary Proceeding"). The complaint seeks an order from the Bankruptcy Court: (1) equitably subordinating certain claims of senior indebtedness based upon inequitable conduct by a number of different individuals and interests in the Chapter 11 cases;

¹³ The Senior Noteholders dispute that any part of the liability compromised pursuant to the VIA Settlement Agreement is or ever was due to VIA. The agreement that gave rise to the VIA/S3G Allowed Claim imposes obligations on SONICblue to make payments and render performance to S3G, not to VIA. The notion that S3G could "allocate" to VIA a claim owed to S3G and, in the process, provide that claim with seniority where none previously existed finds no support in the Indenture or anywhere else. The 2002 Noteholders reserve all rights in this regard.

1 (2) classifying the VIA/S3G Allowed Claim as Senior Indebtedness; and (3) declaratory relief in
2 connection with the same (the "Adversary Complaint"). (RJN, Ex. 28.) On July 11, 2007, the Sen-
3 ior Noteholders filed a Motion to Dismiss the Adversary Proceeding (the "Senior Noteholders' Mo-
4 tion to Dismiss"), (RJN, Ex. 29 [Adversary Proceeding Docket No. 12]), which was denied by the
5 Bankruptcy Court on October 2, 2007. (RJN, Ex. 31 [Adversary Proceeding Docket No. 49].)

6 **8. The Chapter 11 Trustee's Proposed Plan And Disclosure Statement**

7 The Chapter 11 Trustee filed its proposed plan (the "Plan"), (RJN 15 [Docket No. 2391]),
8 and disclosure statement (the "Trustee's Disclosure Statement"), (RJN, Ex. 16 [Docket No. 2392]),
9 on July 20, 2007, and, thereafter, sought an order from the Bankruptcy Court approving the Trus-
10 tee's Disclosure Statement as containing "adequate information" in accordance with Section 1125
11 of the Bankruptcy Code. On August 21, 2007, SB Claims filed an objection to the Trustee's Dis-
12 closure Statement (the "Section 1125 Objection"), (RJN, Ex. 17 [Docket No. 2429]), and subse-
13 quently served deposition notices on various parties purportedly in connection with its Section
14 1125 Objection.

15 On August 27, 2007, the Chapter 11 Trustee filed an emergency motion seeking entry of a
16 protective order with respect to these deposition notices on the theory that the information sought
17 therein is wholly unrelated to the Section 1125 Objection ("Protective Order Motion"), (RJN, Ex.
18 18 [Docket No. 2436]), which SB Claims opposed on September 5, 2007 ("Protective Order Oppo-
19 sition"), (RJN, Ex. 20 [Docket No. 2458]). At the hearing on the Protective Order Motion, the
20 Bankruptcy Court made it clear that it did not want the Plan to go forward before the Chapter 11
21 Trustee completed the Trustee Investigation (as described below). (RJN, Ex. 21 at 12:8-13:15,
22 18:20-22 [Docket No. 2504].) Accordingly, the Chapter 11 Trustee voluntarily removed the Dis-
23 closure Statement from the calendar, thereby stopping the plan process from proceeding.

24 **9. The Motion To Reconstitute The Initial Creditors Committee**

25 On June 11, 2007, SB Claims filed a motion to reconstitute the Initial Creditors Committee
26 (the "Motion to Reconstitute"). (RJN, Ex. 14 [Docket No. 2341].) In support of the Motion to Re-
27 constitute, SB Claims merely regurgitated the Findings regarding the purported conduct of the Sen-
28

ior Noteholders and their counsel. (See RJN, Exs. 7 at 17; 11 at 3.) SB Claims, however, did not file any supporting declarations or offer any new evidence to support its allegations with respect to the actions of the Senior Noteholders or the Initial Creditors Committee.

The Bankruptcy Court relied on these very same facts in ordering the reconstitution of the Initial Creditors Committee, finding at the hearing that the Senior Noteholders had failed to disclose their involvement in the settlement negotiations, had failed to disclose the Conflict of Interest with Pillsbury, and had failed to disclose their role within the Initial Creditors Committee. (RJN, Ex. 22 at 50:14–52:12 [Docket No. 2505].) Notwithstanding that the facts and conclusions alleged by SB Claims were subject to the instant appeal, and that *no new evidence* was introduced at the hearing despite the Senior Noteholders' counsel's request for an evidentiary hearing, (RJN, Ex. 22 at 27:9–13, 33:3–7), and that the U.S. Trustee's position that there were no facts in the record to support the relief requested, (RJN, Ex. 22 at 45:19 – 46:5), the Bankruptcy Court ruled that the facts supported a ruling that the U.S. Trustee had abused her discretion in failing to reconstitute the Initial Creditors Committee, (RJN, Ex. 22 at 50:18–21). The Bankruptcy Court granted the Motion to Reconstitute on October 4, 2007 (the "Reconstitution Order"). (RJN, Ex. 23 [Docket No. 2510].) In accordance therewith, the U.S. Trustee dissolved the Initial Creditors Committee on October 10, 2007. (RJN, Ex. 25 [Docket No. 2520].)

10. The Motions To Partially Vacate The Settlement Order

On October 31, 2007, despite the ongoing Adversary Proceeding directed at the very same conduct, SB Claims filed two duplicative motions to modify or vacate in part the order approving the VIA Settlement (collectively, the "Motions for Partial Modification of the Settlement Order"). The first of these motions is directed at the conduct of the Senior Noteholders ("Motion for Partial Relief from Settlement Order"). (RJN, Ex. 26 [Docket No. 2545].) The second of these motions seeks the same relief but is directed at Pillsbury's conduct, alleging that Pillsbury committed fraud on the Bankruptcy Court because of the undisclosed Conflict of Interest ("Motion to Vacate or Modify Settlement Order"). (RJN, Ex. 27 [Docket No. 2548]).¹⁴

¹⁴ SB Claims filed a Supplement to Motion to Modify and/or Vacate Settlement Order, (RJN, Ex. 63 [Docket No. 2558]), in which it contends that Pillsbury also committed a fraud on the court

1 **C. The Motion To Dismiss The Appeal**

2 As discussed above, the Senior Noteholders have appealed the decisions of the Orders. On
3 October 11, 2007, the Chapter 11 Trustee filed his Motion that seeks to dismiss the Appeal for lack
4 of jurisdiction. As will be shown below, the Appellate Issues do indeed provide this Court with
5 jurisdiction.

6 **III. RELIEF REQUESTED**

7 As long as the Bankruptcy Court and the parties in these Bankruptcy Cases operate under
8 the assumption that the Findings are etched in stone, the underlying bankruptcy estate (and inno-
9 cent creditors) will continue to bleed from a thousand cuts as a result of the various contested mat-
10 ters that have been filed based primarily on the Findings. In opposition to the Motion (the "Oppo-
11 sition"), the Senior Noteholders submit that they have standing to bring the Appeal, and that appel-
12 late review is warranted. Moreover, it is important that the Bankruptcy Court take no further action
13 with respect to these matters while the Appellate Issues are subject to review. Hence, the Senior
14 Noteholders combine their Opposition with a cross-motion to stay matters below that relate to the
15 Findings pending review. Alternatively, or in conjunction with such a stay, cause exists to with-
16 draw the reference to permit this Court to deal with all such matters in a single, judicially efficient
17 forum. Only then can the interests of justice prevail.

18 As revealed in the recent status report of the Chapter 11 Trustee, the Senior Noteholders
19 were willing to consent to a reserve above and beyond the amount of the VIA/S3G Allowed Claim
20 to protect the protagonists if they are successful on their theories. (RJN, Ex. 24.) Indeed, the Sen-
21 ior Noteholders have no objection to resolving the pending litigation in a fair and prompt manner—
22 without other creditors being held up with respect to their deserved distributions and without bleed-
23 ing the estate dry with unnecessary litigation. Thus, the Senior Noteholders request that this Court:
24 (1) deny the Motion; (2) enter an order staying the pending Motions for Partial Modification of the
25 Settlement Order and the Adversary Proceeding related to the same (except for discovery which
26
27 because Pillsbury failed to disclose a tolling agreement it reached with former officers of the
28 Debtor after those directors sought indemnification from Pillsbury based on a suit filed by the jun-
ior noteholders. (RJN, Ex. 63 at 5.)

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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18 -----X
 19 :
 20 In re :
 21 SONICBLUE INCORPORATED, a Delaware :
 corporation; DIAMOND MULTIMEDIA :
 22 SYSTEMS, INC., a Delaware corporation; :
 REPLAYTV, INC., a Delaware corporation; :
 23 and SENSORY SCIENCE CORPORATION, a :
 Delaware corporation, :
 24 Debtors and Debtors in Possession. :
 25 :
 26 -----X

Case No. C-07-02553 RMW

**REQUEST FOR JUDICIAL NO-
 TICE IN SUPPORT OF SENIOR
 NOTEHOLDERS' OPPOSITION
 TO MOTION TO DISMISS AP-
 PEAL AND CROSS-MOTIONS
 FOR LIMITED STAY OF PRO-
 CEEDINGS AND/OR TO WITH-
 DRAW REFERENCE OF CHAP-
 TER 11 CASES**

1 Appellants Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and Citadel
2 Equity Fund Ltd. (the "Senior Noteholders"), by and through their counsel, hereby request the
3 Court to take judicial notice of these certain items designated in the Senior Noteholders' Designa-
4 tion of Items to be Included in the Record on Appeal and Statement of Issues on Appeal (the
5 "ADR") (Docket No. 3), the and certain additional items pursuant to Federal Rule of Evidence 201:

6 1. Order Granting Debtors' Motion for Approval of Settlement of VIA and Intel Liti-
7 gation, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
8 Case No. 03-51775 (Docket No. 1981).

9 2. Motion by United States Trustee for Appointment of a Chapter 11 Trustee or, in the
10 Alternative, an Examiner, In re SonicBlue Inc., United States Bankruptcy Court for the Northern
11 District of California, Case No. 03-51775 (Docket No. 2153) (ADR, Ex. 28).

12 3. Motion to Disqualify Pillsbury Winthrop Shaw Pittman LLP, to Vacate Employ-
13 ment Order, and for Disgorgement of Attorneys' Fees, In re SonicBlue Inc., United States Bank-
14 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2163) (ADR,
15 Ex. 29).

16 4. Amended Motion of United States Trustee for Appointment of Chapter 11 Trustee,
17 In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case
18 No. 03-51775 (Docket No. 2168) (ADR, Ex. 30).

19 5. Motion to Convert Case to Chapter 7, In re SonicBlue Inc., United States Bank-
20 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2171) (ADR,
21 Ex. 31).

22 6. First Amended Motion to Convert Case to Chapter 7, In re SonicBlue Inc., United
23 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
24 2173) (ADR, Ex. 32).

25 7. Memorandum Decision and Order on Motion to Appoint a Chapter 11 Trustee, Mo-
26 tion to Convert Case, and Motion to Disqualify Pillsbury Winthrop Shaw Pittman LLP and for
27 Disgorgement of Attorneys' Fees, In re SonicBlue Inc., United States Bankruptcy Court for the
28 Northern District of California, Case No. 03-51775 (Docket No. 2220) (ADR, Ex. 49).

1 8. Motion for Clarification, or in the Alternative, Leave to File a Motion for Reconsid-
2 eration, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
3 nia, Case No. 03-51775 (Docket No. 2231) (ADR, Ex. 51).

4 9. Application for Order Approving the Appointment of Chapter 11 Trustee, In re
5 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
6 03-51775 (Docket No. 2239).

7 10. Order Approving Appointment of Chapter 11 Trustee, In re SonicBlue Inc., United
8 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
9 2242).

10 11. Memorandum Decision and Order on Motion of Senior Noteholders for Clarifica-
11 tion, or in the Alternative, Reconsideration, In re SonicBlue Inc., United States Bankruptcy Court
12 for the Northern District of California, Case No. 03-51775 (Docket No. 2279) (ADR, Ex. 57).

13 12. Notice of Appeal to District Court, In re SonicBlue Inc., United States Bankruptcy
14 Court for the Northern District of California, Case No. 03-51775 (Docket No. 2292) (ADR, Ex. 58).

15 13. Notice of Transfer of Claim Other Than for Security, In re SonicBlue Inc., United
16 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
17 2316).

18 14. Motion for Order (1) Directing United States Trustee to Change the Membership of
19 Official Committee of Creditors Holding Unsecured Claims, or (2) Directing the Appointment of a
20 New Trade Creditor Committee, In re SonicBlue Inc., United States Bankruptcy Court for the
21 Northern District of California, Case No. 03-51775 (Docket No. 2341).

22 15. Joint Chapter 11 Plan of Liquidation Proposed by Dennis J. Connolly, Chapter 11
23 Trustee, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of Califor-
24 nia, Case No. 03-51775 (Docket No. 2391).

25 16. Disclosure Statement Describing Joint Chapter 11 Plan of Liquidation Proposed by
26 Dennis J. Connolly, Chapter 11 Trustee, In re SonicBlue Inc., United States Bankruptcy Court for
27 the Northern District of California, Case No. 03-51775 (Docket No. 2392).

1 17. Objection of SonicBlue Claims LLC to Disclosure Statement Describing Joint
2 Chapter 11 plan of Liquidation Proposed by Dennis J. Connolly, Chapter 11 Trustee, In re
3 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
4 03-51775 (Docket No. 2429).

5 18. Emergency Motion for Protective Order in Respect of SonicBlue Claims' Notices of
6 Deposition of Henry Kevane, John J. Todd, Albert Boro, Suzanne Uhland, and Bruce Bennett, on
7 September 6, 10, 11, 12 and 13, 2007, In re SonicBlue Inc., United States Bankruptcy Court for the
8 Northern District of California, Case No. 03-51775 (Docket No. 2436).

9 19. Response to Motion for Order Shortening Time on Trustee's Motion for a Protective
10 Order, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
11 Case No. 03-51775 (Docket No. 2445).

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5 Settlement of VIA and Intel Litigation Under Seal, In re SonicBlue Inc., United States Bankruptcy
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15 ment, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District of California,
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19 fornia, Case No. 03-51775 (Docket No. 2047) (ADR, Ex. 11).

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21 ruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No. 2091) (ADR,
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23 56. Supplemental Objection to Joint Disclosure Statement Dated January 18, 2007, In re
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25 03-51775 (Docket No. 2115) (ADR, Ex. 17).

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1 58. Submission of Preliminary Status Report and Request for Continuance of Deadline
2 for Submission of Final Status Report and of Disclosure Statement, In re SonicBlue Inc., United
3 States Bankruptcy Court for the Northern District of California, Case No. 03-51775 (Docket No.
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6 close Confidential Information to People Who are Not Parties to the VIA/Intel Confidentiality
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9 of California, Case No. 03-51775 (Docket No. 2176) (ADR, Ex. 34).

10 60. Transcript of Hearing Held on May 4, 2007 re a) Motion for Clarification, or in the
11 Alternative, for Leave to File a Motion for Reconsideration by Portside Growth & Opportunity
12 Fund, Smithfield Fiduciary LLC, and Citadel Equity Fund, Ltd.; b) Amended Opposition by Sonic
13 Blue Claims, LLC, In re SonicBlue Inc., United States Bankruptcy Court for the Northern District
14 of California, Case No. 03-51775 (Docket No. 2303) (ADR, Ex. 61).

15 61. Reply to SonicBlue Claims LLC's Response to Preliminary Status Report, In re
16 SonicBlue Inc., United States Bankruptcy Court for the Northern District of California, Case No.
17 03-51775 (Docket No. 2150) (ADR, Ex. 27).

18 62. First Amended Disclosure Statement Describing First Amended Liquidating Plan of
19 Reorganization, Dated as of January 18, 2007, In re SonicBlue Inc., United States Bankruptcy
20 Court for the Northern District of California, Case No. 03-51775 (Docket No. 2103) (ADR, Ex. 14).

21 63. Supplemental Document in Support of Motion to Vacate, In re SonicBlue Inc.,
22 United States Bankruptcy Court for the Northern District of California, Case No. 03-51775
23 (Docket No. 2558).

24 64. Stipulated Protective Order, In re SonicBlue Inc., United States Bankruptcy Court
25 for the Northern District of California, Case No. 03-51775 (Docket No. 529) (ADR, Ex. 9).

26 65. Reply Brief in Support of Motion for Clarification, or in the Alternative, for Leave
27 to File a Motion for Reconsideration, In re SonicBlue Inc., United States Bankruptcy Court for the
28 Northern District of California, Case No. 03-51775 (Docket No. 2265) (ADR, Ex. 54).

1 66. Appellants Designation of Items to be Included on the Record on Appeal and
2 Statement of Issues on Appeal, In re SonicBlue Inc., United States Bankruptcy Court for the
3 Northern District of California, Case No. 03-51775 (Docket No. 2308).

4 67. Reply by Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and
5 Citadel Equity Fund Ltd. to SonicBlue Claims LLC's Reply to Opposition to the U.S. Trustee's
6 Motion to Disqualify Pillsbury, In re SonicBlue Inc., United States Bankruptcy Court for the
7 Northern District of California, Case No. 03-51775 (Docket No. 2202) (ADR, Ex. 46).

8 Under Federal Rule of Evidence 201, a court may take judicial notice of "facts that are not
9 subject to reasonable dispute in that they are either (1) generally known within territorial jurisdic-
10 tion of the trial court or (2) capable of accurate and ready determination by resort to sources whose
11 accuracy cannot reasonably be questioned." Biggs v. Capital Factors, Inc., 120 F.3d 268 (9th Cir.
12 1997). This Court may take judicial notice of Exhibits 1-67 because they are capable of accurate
13 and ready determination since they are from the files of this Court as well as the United States
14 Bankruptcy Court for the Northern District of California. See Duke Energy Trading & Mktg.,
15 L.L.C. v. Davis, 267 F.3d 1042, 1048 n.3 (9th Cir. 2001) (Ninth Circuit took judicial notice of fil-
16 ings made in related bankruptcy proceeding). Furthermore, the exhibits "consist of court records,
17 the accuracy of which cannot reasonably be questioned." Esiomeme v. United Airlines, Inc., 369
18 B.R. 531, 1-2 (N.D. Cal. 2007) (granting defendant's request for judicial notice of debtor's volun-
19 tary bankruptcy petition and bankruptcy court's orders confirming debtor's plan of reorganization).

1 Accordingly, the Senior Noteholders respectfully request that this Court take judicial notice
2 of Exhibits 1-67.¹

3 Dated: November 20, 2007

STROOCK & STROOCK & LAVAN LLP

4
5 By: /s/ Alan Z. Yudkowsky

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7 Attorneys for Portside Growth & Opportunity Fund,
8 Smithfield Fiduciary LLC, and
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26
27 ¹ Any party that requires a copy of the exhibits to this Request for Judicial Notice
28 may request such copies from counsel to the Senior Noteholders, and will be provided such copies
free of charge.

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15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN JOSE DIVISION**
 18

19 In re) Case No. C-07-02553 RMW

20 SONICBLUE INCORPORATED, a Delaware)
 corporation; DIAMOND MULTIMEDIA SYS-) **MEMORANDUM OF POINTS AND AU-**
 21 TEMS, INC., a Delaware corporation; RE-) **THORITIES IN SUPPORT OF SENIOR**
 22 PLAYTV, INC., a Delaware corporation; and) **NOTEHOLDERS' OPPOSITION TO MO-**
 23 SENSORY SCIENCE CORPORATION, a) **TION TO DISMISS APPEAL AND**
 Delaware corporation,) **CROSS-MOTIONS FOR LIMITED STAY**
 24 Debtors and Debtors in Possession.) **OF PROCEEDINGS AND/OR TO WITH-**
 25) **DRAW REFERENCE OF CHAPTER 11**
) **CASES**

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1 **I. INTRODUCTION**

2 Appellants Portside Growth & Opportunity Fund, Smithfield Fiduciary LLC, and Citadel
3 Equity Fund Ltd. (collectively, the "Senior Noteholders") hereby oppose (the "Opposition") the
4 Motion to Dismiss Appeal (the "Motion") filed by the Chapter 11 Trustee and submit this memo-
5 randum of points and authorities in support of the Opposition as well as their Cross-Motions for a
6 Limited Stay of Proceedings and/or to Withdraw the Reference of Chapter 11 Cases (the "Cross-
7 Motions").

8 Principally at issue is a March 26, 2007 opinion and order of the United States Bankruptcy
9 Court for the Northern District of California (the "Bankruptcy Court") that, among other things,
10 appointed a Chapter 11 Trustee in an effort to correct what the Bankruptcy Court termed "the com-
11 plete breakdown of creditor confidence" stemming from a conflict of interest suffered by the debt-
12 ors' attorneys, Pillsbury, Winthrop, Shaw Pittman LLP f/k/a Pillsbury Winthrop LLP ("Pillsbury")
13 (the "First Opinion"). (Appellants Designation of Record ("ADR"), Ex. 49 at 1 [Docket No.
14 2220];¹ Request for Judicial Notice ("RJN"), Ex. 7 at 1.) At the time the Chapter 11 Trustee was
15 appointed, it was suggested that this conflict of interest caused Pillsbury to assist in brokering a set-
16 tlement agreement containing a term that was favorable to the Senior Noteholders.

17 In essence then, the "breakdown" arose in connection with the manner in which the settle-
18 ment was negotiated, proposed, and ultimately approved in the Bankruptcy Court. Importantly,
19 however, no party-in-interest has claimed that the settlement was not in the best interests of the es-
20 tates. The only party claiming to be harmed by the settlement is a party who had the benefit of full
21 disclosure and representation by counsel in connection with the allegedly offending settlement pro-
22 vision, and the allegedly offending settlement provision did not cost the debtors' estates anything
23 as it was in the nature of an agreed clarification of a pre-petition agreement.

24 Also noteworthy is the uncontroverted circumstances of the conflict of interest: it stemmed
25 from a dispute between Pillsbury and the Senior Noteholders that arose more than three months
26 *after* the allegedly offending settlement provision was proposed (and approximately one year after

27 ¹ Unless otherwise indicated, all docket entries referenced herein are on the record in the
28 Chapter 11 cases pending before the Bankruptcy Court, Case No. 03-51775.

1 the provision was agreed to in principle) and almost three months *after* it was agreed to by the party
2 allegedly harmed by it. And the actual conflict of interest touched only *one* of the debtors' two law
3 firms that advised the debtors in connection with the settlement. No one has suggested, nor can
4 they, that the second law firm ever suffered under any conflict of interest.

5 No party-in-interest – not the Senior Noteholders, the non-debtor party to the settlement, the
6 debtors (through either law firm), or the initial official committee of unsecured creditors – affirma-
7 tively disclosed the allegedly offending settlement provision, which only affected the Senior Note-
8 holders and the non-debtor party to the settlement, in a settlement that everyone still agrees was in
9 the best interests of the estate. While the allegedly offending settlement provision may not have
10 been specifically highlighted or called to the Bankruptcy Court's attention, *it was included in pa-*
11 *pers submitted to the Bankruptcy Court.* With perfect hindsight, of course, it would be foolish to
12 dispute that this settlement term should have been affirmatively disclosed. The fact that so many
13 parties failed to make an affirmative disclosure, however, strongly suggests that the failure was in-
14 advertent, and the fact that the settlement remains undisputedly a "good deal" confirms that no
15 harm was done.

16 Against this backdrop (but without consideration of any of the foregoing undisputed cir-
17 cumstances), the Bankruptcy Court appointed a Chapter 11 Trustee to investigate the facts and cir-
18 cumstances surrounding the settlement, which appointment the Senior Noteholders did not oppose.
19 In its opinion, the Bankruptcy Court conceded that the Senior Noteholders' motive in connection
20 with the settlement was "not known." (RJN, Ex. 7 at 17.) Yet in the same opinion, the Bankruptcy
21 Court purported to find facts regarding the alleged, but unsubstantiated, behavior of the Senior
22 Noteholders' counsel that demonstrated improper motives. (*Id.*) And in the later, related clarifica-
23 tion opinion, the Bankruptcy Court erroneously concluded that there was an "appearance of con-
24 cealment" and that the participation by the largest creditors in the single most important settlement
25 to the estates was "unusual" (the "Clarification Denial Order" and, collectively with the First Opin-
26 ion, the "Orders"). (ADR, Ex. 57 at 3-4 [Docket No. 2279]; RJN, Ex. 11 at 3-4.)

1 Because these, and other, findings in the Orders were unnecessary to the motions before the
2 Bankruptcy Court, clearly erroneous, and unsupported by the record, the Senior Noteholders filed
3 this appeal (the "Appeal"). The Chapter 11 Trustee has moved to dismiss the Appeal on the
4 grounds that this Court does not possess jurisdiction to review factual findings contained in the Or-
5 ders where the Senior Noteholders have not challenged the results reached in the Orders. (Mot. at
6 2, 6-7.) Although the Chapter 11 Trustee correctly states the general rule that only a party "ag-
7 grieved" by a judgment or order may appeal therefrom, the Ninth Circuit has recognized prudential
8 exceptions to the "prevailing party" rule, and the Senior Noteholders satisfy those exceptions.
9 Therefore, the Senior Noteholders are deemed "aggrieved" by the Orders and have standing to ap-
10 peal. Specifically, because the Orders contain discussions of issues that are immaterial to the mo-
11 tions that were before the Bankruptcy Court, the Senior Noteholders may seek reformation of the
12 Orders. Furthermore, for the reasons set forth herein, the Orders may be appealed because they
13 could potentially serve as the basis for collateral estoppel in subsequent litigation.

14 Following entry of the Orders and the filing of this Appeal, the Bankruptcy Court again re-
15 lied upon the disputed findings of "fact," without any evidentiary hearing, to reconstitute the credi-
16 tors committee, and these same findings have recently spawned two separate motions for relief
17 from the order approving the settlement. Because the Bankruptcy Court has more than once relied
18 on certain factual findings in granting relief, however, the Senior Noteholders also file concurrently
19 herewith the Cross-Motions.

20 The Senior Noteholders have no opposition to a full and fair investigation of their conduct
21 in these bankruptcy cases; however, to date, the Senior Noteholders have had no opportunity to be
22 heard. The Senior Noteholders file the accompanying Cross-Motions, therefore, to ensure they
23 have the opportunity to present a full and accurate picture regarding their conduct and, perhaps
24 more importantly, to avoid the waste of estate resources in the underlying Chapter 11 cases.

II. STATEMENT OF FACTS

A. The Senior Noteholders And The Debtor

In April 2002, in the face of mounting economic pressure caused by faltering finances, SONICblue, Incorporated (the “Debtor” or “SONICblue”),² negotiated the issuance of senior secured subordinated convertible debentures (the “Senior Notes”) with the Senior Noteholders in the amount of \$75 million, pursuant to an indenture dated as of April 22, 2002 (the “Indenture”).³ (ADR, Exs. 20 at 32:3-11 [Docket No. 2136], 37, Declaration of Ana N. Damonte (“Damonte Declaration”) at ¶¶ 2-9 [Docket No. 2182]; RJN, Exs. 53 at 32:3-11, 35 at ¶¶ 2-9.) Significantly for this case, one provision of the Indenture provided that the Senior Notes were subordinate to certain other obligations (“Senior Indebtedness” and the “Senior Indebtedness Provision”), including “[a]ll indebtedness of [SONICblue] due and owing to Via Technologies, Inc. [(“VIA”)] in an aggregate principal amount not to exceed \$15,000,000 or the equivalent thereof in any other currency or composite currency.”⁴ (ADR, Ex. 37, Indenture, at Section 1.1 (g) [Docket No. 2182]; RJN, Ex. 35, Indenture, at Section 1.1(g).)

B. The Bankruptcy Cases

Just ten months after it issued the Senior Notes, due to the continued deterioration of the Debtors’ businesses, it became necessary for the Debtors to file for bankruptcy protection. On March 21, 2003 (the “Petition Date”), therefore, each of the Debtors commenced a Chapter 11 case by filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the Bankruptcy Court. These Chapter 11 cases were procedurally consolidated for administrative purposes, and these petitions were assigned to United States Bankruptcy Judge Marilyn Morgan in case numbers 03-51775-035178-MM (the “Bankruptcy Cases”). That same day, the Office of the United States Trustee (the “U.S. Trustee”) appointed the Senior Note-

² The Debtor, a Delaware corporation formerly known as S3 Inc., is a consumer electronics company. Debtors ReplayTV, Inc., Sensory Science Corp., and Diamond Multimedia Systems Inc. are wholly-owned subsidiaries of SONICblue. Collectively, these entities are the debtors (the “Debtors”) herein.

³ Pillsbury was the Debtor’s counsel during these negotiations. It had been the Debtor’s general corporate and litigation counsel for many years.

⁴ In 2001, VIA and the Debtor formed a joint venture—S3 Graphics Co., Ltd. (“S3G”).

holders to the initial Official Committee of Unsecured Creditors (the “Initial Creditors Committee”). (ADR, Ex. 1 [Docket No. 26]; RJN, Ex. 36.) Each of the Senior Noteholders filed a proof of claim (the “Indenture Claims”) related to the Senior Notes.

Pillsbury again was retained by the Debtors, and Hennigan, Bennett & Dorman LLP (“HBD”) represented the Senior Noteholders in connection with the Bankruptcy Cases. Levene, Neale, Bender, Rankin & Brill LLP (“LNBRB”) was appointed as counsel for the Initial Creditors Committee.

1. The Initial Creditors Committee

In addition to being appointed to the Initial Creditors Committee, the U.S. Trustee included the Senior Noteholders in all subsequent amended appointments to the Initial Creditors Committee. (ADR, Exs. 6 [Docket No. 119], 8 [Docket No. 528]; RJN, Exs. 36, 37, 38.) At first, all eight members of the Initial Creditors Committee participated actively, (ADR, Ex. 39, Declaration of Ron Bender (“Bender Declaration”) at ¶ 24 [Docket No. 2185]; RJN, Ex. 45 at ¶ 24), but after 2003, only the Senior Noteholders, Matsushita Kotobuki Electronics Sales of America LLC, and Matsushita Kotbuki Electronics Industries were truly involved, (RJN, Exs. 45 at ¶¶ 24-27, 53 at 5:15-6:6).

From the time of their appointment through the filing of this appeal, the Senior Noteholders were openly active members of the Initial Creditors Committee. The other key actors in the Bankruptcy Cases – including, for example, the Debtors, Pillsbury, VIA, and Ron Bender of LNBRB – were well aware that the Senior Noteholders were members of the Initial Creditors Committee and that Bruce Bennett of HBD represented the Senior Noteholders as such—*not the Initial Creditors Committee*. Every document contained in the record supports this view, and that they functioned as separate and distinct parties. (See, e.g., ADR, Exs. 2 at ¶ 4 [Docket No. 28]; 3 at 1-2 [Docket No. 43]; 4 at ¶¶ 11-12 [Docket No. 63]; 5 at ¶¶ 7-8 [Docket No. 64]; 7 at 1 [Docket No. 334]; 10 at 1 [Docket No. 545]; RJN, Ex. 35, Declaration of Albert J. Boro (“Boro Decl.”) at ¶¶ 10, 14 (“Following that, we spoke with Mr. Bennett, counsel for the Senior Noteholders”), 17-18, 25; RJN, Exs. 45, Bender Decl. at ¶ 4, 40 at 1-2, 41 at ¶¶ 11-12, 42 at ¶¶ 7-8, 43 at 1, 44 at 1, 45 at ¶¶ 13 n.1,

27.)⁵ What is more, as made clear by the Senior Noteholders, “[n]o issues put before the [Initial] Creditors’ Committee have been determined by the Senior Noteholders alone.” (ADR, Ex. 36 at 2 [Docket No. 2181]; RJN, Ex. 46 at 2.) Finally, the Senior Noteholders never participated in an Initial Creditors Committee vote “relating to an issue in which the senior noteholders had a distinct interest” [ADR, Ex. 50 at 37:17-20 [Docket No. 2226]; RJN, Ex. 47 at 37:17-20.)

2. The VIA Litigation And The Intel Motion

Since its formation, VIA and the Debtor have had a contentious relationship regarding S3G—their joint venture. On June 6, 2003, Intel Corporation (“Intel”) filed a motion seeking, *inter alia*, to terminate a patent licensing agreement with the Debtor related to its use by S3G (the “Intel Motion”). Since Pillsbury had previously represented Intel, the Debtor hired O’Melveny & Meyers LLP (“OMM”) as independent, special litigation counsel respecting the Intel Motion. (RJN, Ex. 35, Boro Decl. at ¶ 4.) Then, on July 17, 2003, VIA and S3G filed duplicate proofs of claim for \$70 million in the Bankruptcy Cases based on an alleged breach of their joint venture agreement, involving the patent licensing agreement that was the subject of the Intel Motion. (RJN, Ex. 35, Boro Decl. at ¶ 2.) The Debtor objected to these claims, and subsequently, on December 21, 2004, the Debtor filed an adversary complaint against VIA and S3G (the “VIA Litigation”). (Appellee’s Designation of Record (“APDR”), Ex. 74 [Docket No. 42]; RJN, Ex. 48.)

3. The VIA Settlement Negotiations

According to the Bankruptcy Court, the resolution of the Intel Motion and the settlement of the duplicate claims were the major impediments towards bringing the Bankruptcy Cases to a con-

⁵ For example, on October 9, 2003, the parties involved in the VIA Litigation and Intel Motion described below entered into a Stipulated Protective Order (the “Protective Order”) that was signed by the Bankruptcy Court on October 17, 2003. It is clear from the face of the Protective Order that these parties viewed the Senior Noteholders and the Initial Creditors Committee as separate and distinct entities to be covered by the Protective Order. Significantly, the attorneys from LNBRB and HBD were separately given designations to view documents under the Protective Order. (ADR, Ex. 9 at 3-5 [Docket No. 529]; RJN, Ex. 64 at 3-5.) Finally, the Protective Order was signed by counsel for the Senior Noteholders as “Attorneys for the Senior Debtholders,” and the Protective Order was separately executed by counsel for the Initial Creditors Committee. (RJN, Ex. 64 at 12.)

1 clusion.⁶ (RJN, Ex. 7 at 17 (“During the past year and a half, SONICblue’s litigation against VIA
 2 and [S3G] has been the main roadblock to the proposal of a plan and the conclusion of this case.”).)
 3 Settlement negotiations between the parties began in August 2005 (the “VIA Settlement Negotia-
 4 tions”). HBD, and by extension Mr. Bennett, were involved in the VIA Settlement Negotiations
 5 solely as counsel for the Senior Noteholders. (RJN, Ex. 35, Boro Decl. at ¶¶ 10, 14, 17-18, 25.)
 6 There is nothing in the record to indicate that any party involved in the VIA Settlement Negotia-
 7 tions somehow thought otherwise. (See, e.g., RJN, Ex. 35, Boro Decl. at ¶ 10.) Although an
 8 agreement was reached in principle in September 2005, it was not until late September 2006 that
 9 the VIA Settlement Negotiations produced a finalized agreement (the “VIA Settlement Agree-
 10 ment”). (APDR, Exs. 63 [Docket No. 1950], 64 [Docket No. 1951], 65 [Docket No. 1955], 67
 11 [Docket No. 2057]; RJN, Exs. 49-52.)

12 The first settlement meeting occurred on August 11, 2005, and was attended by representa-
 13 tives of VIA and the Debtor. (RJN, Ex. 35, Boro Decl. at ¶ 9.) There, VIA contended that its al-
 14 lowed claim should be \$42.5 million. The Debtor countered that an allowed claim of \$6 million
 15 might be acceptable, but that the Initial Creditors Committee needed to approve before a formal
 16 offer could be made. (RJN, Ex. 35, Boro Decl. at ¶ 9.) After the attorneys for the Initial Creditors
 17 Committee consulted with Mr. Bennett on behalf of the Senior Noteholders, they authorized the
 18 Debtor to counter with a settlement offer of \$6 million. (RJN, Ex. 35, Boro Decl. at ¶ 10.) Pills-
 19 bury believed that the consent of the Senior Noteholders to the terms of any settlement was essen-
 20 tial to court approval.⁷ (RJN, Ex. 35, Boro Decl. at ¶ 11.) And Mr. Bennett confirmed on August
 21 30, 2005 that the Senior Noteholders would support a \$6 million counteroffer. (RJN, Ex. 35, Boro
 22 Decl. at ¶ 10.)

23
 24
 25 ⁶ According to the Bankruptcy Court, “[t]his litigation was also significant because termination
 26 of [the intellectual property rights] would arguably trigger the liquidated damages provision of the
 joint venture agreement [between VIA and the Debtor].” (RJN, Ex. 7 at 7.)

27 ⁷ At both the August and September 2005 settlement meetings, the parties discussed that VIA’s
 28 claim would be given the same priority as other general unsecured creditors. (RJN, Ex. 35, Boro
 Decl. at ¶ 15.)

1 Following this meeting, Pillsbury participated in settlement discussions with the Debtor's
 2 independent, special litigation counsel, OMM, LNBRB for the Initial Creditors Committee, and
 3 Mr. Bennett on behalf of the Senior Noteholders. (RJN, Ex. 35, Boro Decl. at ¶ 11.) Based on
 4 those discussions, Pillsbury concluded that a global settlement that included Intel was necessary
 5 and that a settlement amount of less than \$25 million would be acceptable to the Initial Creditors
 6 Committee. (RJN, Ex. 35, Boro Decl. at ¶ 11.) On September 12, 2005, counsel for VIA sent
 7 Pillsbury a draft settlement term sheet proposing that VIA be allowed a general unsecured claim in
 8 the amount of \$27.5 million. (RJN, Ex. 35, Boro Decl. at ¶ 12.)

9 In a subsequent settlement meeting held on September 15, 2005,⁸ VIA and S3G reduced
 10 their settlement demand to \$19 million. (RJN, Ex. 35, Boro Decl. at ¶ 14.) Following that meet-
 11 ing, Pillsbury spoke with Mr. Bennett who indicated that his clients would only support an allowed
 12 claim of \$10 million. (RJN, Ex. 35, Boro Decl. at ¶ 14.) After consulting with the Debtor, it au-
 13 thorized a \$10 million counteroffer. (RJN, Ex. 35, Boro Decl. at ¶ 14.) Later that day, counsel for
 14 the various parties tentatively agreed to a settlement amount of \$12.5 million subject to client and
 15 creditor approval. (RJN, Ex. 35, Boro Decl. at ¶ 14.) On September 20, 2005, Mr. Bennett con-
 16 firmed the Senior Noteholders' agreement to a \$12.5 million allowed claim; provided that the set-
 17 tlement included, *inter alia*, a provision that the VIA/S3G allowed claim (the "VIA/S3G Allowed
 18 Claim") be neither senior nor junior to other general unsecured claims. (RJN, Ex. 35, Boro Decl. at
 19 ¶ 17.) And the Senior Noteholders did so, because, under the transactional facts fully known to
 20 everyone, the VIA/S3G Allowed Claim would not constitute Senior Indebtedness. (See RJN, Exs.
 21 35, Boro Decl. at ¶¶ 15-17, 45 at ¶ 40.)

22 In a conference call that same day with VIA and S3G, the Debtor accepted the settlement
 23 terms so long as the VIA/S3G Allowed Claim be neither senior nor junior to other general unse-
 24 cured claims. (RJN, Ex. 35, Boro Decl. at ¶ 17.) VIA and S3G did not object to this language and
 25

26 ⁸ At the time of the September 15, 2005 settlement meeting, Mr. Boro was aware of the Senior
 27 Indebtedness Provision contained in the Senior Debenture, (RJN, Ex. 35, Boro Decl. at ¶ 15), and
 28 he came to the conclusion that the Senior Indebtedness Provision contemplated a loan that had
 never occurred, (RJN, Ex. 35, Boro Decl. at ¶ 17). This provision was not discussed at the Sep-
 tember 15, 2005 meeting. (RJN, Ex. 35, Boro Decl. at ¶ 15.)

1 “wanted to include language that Defendants could decide how to allocate the allowed claim
2 among Defendants.” (RJN, Ex. 35, Boro Decl. at ¶ 17.) On September 22, 2005, the “neither sen-
3 ior nor junior” language again was discussed by Pillsbury with counsel for VIA and S3G. (RJN,
4 Ex. 35, Boro Decl. at ¶ 17.) Counsel for VIA and S3G “posed questions about subordination of the
5 claims of the Senior Noteholders and other creditors, and expressed concern that other creditors not
6 unduly benefit at their clients’ expense, but they nevertheless agreed that their [allowed] claim was
7 neither senior nor junior to other general unsecured claims.” (RJN, Ex. 35, Boro Decl. at ¶ 17.)

8 On September 26, 2005, counsel for the Debtor and VIA finalized a draft of the proposed
9 settlement term sheet, which included the following provision:

10 Claimants shall jointly hold a single, allowed general unsecured
11 claim in the Chapter 11 case of SONICblue Inc., which claim shall be
12 afforded the benefits and priority of SONICblue’s other allowed gen-
13 eral unsecured claims and shall be neither senior nor junior to any
14 other allowed general unsecured claim, in the amount of \$12.5 mil-
15 lion.

16 (RJN, Ex. 35, Boro Decl. at ¶ 18.)

17 Mr. Boro sent the proposed term sheet to Mr. Bennett on behalf of the Senior Noteholders
18 and to LNBRRB on behalf of the Initial Creditors Committee on September 27, 2005. (RJN, Ex. 35,
19 Boro Decl. at ¶ 18.) In a conference call held later that day, the Initial Creditors Committee ap-
20 proved the settlement terms. (RJN, Ex. 35, Boro Decl. at ¶ 18.) Apparently, finalizing the settle-
21 ment between the Debtor, VIA, and S3G was delayed and made complicated by the difficulty in
22 reaching a resolution with Intel. (RJN, Ex. 35, Boro Decl. at ¶ 19.) Thus, the initial draft of a set-
23 tlement agreement was not prepared until January 25, 2006, when OMM circulated a draft that con-
24 tained a provision dealing with the VIA/S3G Allowed Claim that read substantially the same as the
25 one in the September 26, 2005 term sheet. (RJN, Ex. 35, Boro Decl. at ¶ 19.)

26 In April or early May 2006, Pillsbury proposed that the settlement agreement include lan-
27 guage specifically stating that the VIA/S3G Allowed Claim was not “Senior Indebtedness” as set
28 forth in the Senior Notes. (RJN, Ex. 35, Boro Decl. at ¶ 20.) Then, on May 12, 2006, OMM circu-
lated a revised draft with the following language added:

1 Claimants and the Debtor agree that the Allowed Claim is not, and
 2 shall not be treated as, "Senior Indebtedness" under the terms of the
 3 Debtor's Indenture, dated as of April 22, 2002, for the 7-¾ Secured
 Senior Subordinated Convertible Debentures due 2005.

4 (the "Waiver Provision") (RJN, Ex. 35, Boro Decl. at ¶ 17.) At a June 1, 2006 settlement meeting,
 5 the parties discussed proposed language waiving any claim that the settlement amount constituted
 6 Senior Indebtedness under the Senior Notes. (RJN, Ex. 35, Boro Decl. at ¶ 23.) Stating that it was
 7 aware of the Senior Indebtedness Provision and understood that it related to a loan that never oc-
 8 curred, VIA agreed to that limitation. (RJN, Ex. 35, Boro Decl. at ¶ 23.) Substantially the same
 9 language was included in a later revised draft circulated on June 16, 2006 and in the final VIA Set-
 10 tlement Agreement. (RJN, Ex. 35, Boro Decl. at ¶ 24.)

11 Therefore, pursuant to the VIA Settlement Agreement, VIA and S3G agreed, *inter alia*, to
 12 settle in exchange for a general unsecured allowed claim of \$12.5 million that was not "Senior In-
 13 debtedness" as described in the Senior Notes. (RJN Ex. 35, Settlement Agreement, at § 3.) On Oc-
 14 tober 10, 2006, the Debtor filed a motion to approve the VIA Settlement Agreement, which was
 15 granted on October 31, 2006. (APDR, Ex. 66 [Docket No. 1981]; RJN, Exs. 49-52.)

16 4. The Original Issue Discount And The 2002 Opinion Letter

17 As counsel for the Debtor during the negotiations for the Senior Notes, Pillsbury issued an
 18 opinion letter to the Senior Noteholders regarding the enforceability of the Senior Notes (the "2002
 19 Opinion Letter"). (RJN, Ex. 35, Freeman Decl. at ¶ 5.) Later, in its capacity as counsel for the
 20 Debtor in the Bankruptcy Cases, Pillsbury was involved in evaluating possible objections to
 21 claims—including those of the Senior Noteholders. (RJN, Ex. 35, Declaration of William B.
 22 Freeman ("Freeman Declaration") at ¶ 6.) On July 20, 2006, Pillsbury informed the Senior Note-
 23 holders that their claim would be challenged as it was based on unamortized original issue discount
 24 and thus subject to disallowance under 11 U.S.C. § 502(b)(2) (the "OID Issue"). (RJN, Ex. 35,
 25 Freeman Decl. at ¶¶ 6-7.)

26 Mr. Bennett contacted Pillsbury, on behalf of the Senior Noteholders, on August 24, 2006
 27 to discuss the OID Issue and the 2002 Opinion Letter. (RJN, Ex. 35, Freeman Decl. at ¶ 7.) There-
 28 after, on September 5, 2006, HBD sent a letter to Pillsbury that demanded indemnification from

Pillsbury for any possible loss due to the OID Issue (the "Indemnification Demand") based on the 2002 Opinion Letter.⁹ (RJN, Ex. 35, Declaration of Craig A Barbarosh ("Barbarosh Decl.") at ¶ 14.) According to the Senior Noteholders, the 2002 Opinion Letter clearly took the position that the Senior Notes would not be affected or limited by applicable bankruptcy laws. (RJN, Ex. 35, Barbarosh Decl. at ¶ 11.) Pillsbury, in turn, maintained that the 2002 Opinion Letter did nothing of the sort. (RJN, Ex. 35, Barbarosh Decl. at ¶ 11.)

In response to the Indemnification Demand, Pillsbury immediately notified Mr. Bender that Pillsbury had a conflict. (RJN, Ex. 35, Barbarosh Decl. at ¶ 13.) Pillsbury then transferred the responsibility for handling the Senior Noteholders' claims to Mr. Bender and the Initial Creditors Committee. (ADR, Ex. 37, Freeman Decl. at ¶¶ 8-11.) Regardless of the 2002 Opinion Letter's meaning, Pillsbury's failure to properly disclose the conflict caused by the 2002 Opinion Letter (the "Conflict of Interest") led to its eventual disqualification and the cloud that has been cast over these Bankruptcy Cases. (RJN, Ex. 7 at 14-16.)

5. The Initial Disclosure Statement

On December 15, 2006, the Debtor and the Initial Creditors Committee jointly filed a disclosure statement. (ADR, Ex. 11 [Docket No. 2047]; RJN, Ex. 54.) On, January 11, 2007, Riverside Contracting, LLC and Riverside Claims, LLC (collectively, "Riverside") filed objections to that disclosure statement. (ADR, Exs. 13 [Docket No. 2091], 17 [Docket No. 2115]; RJN, Exs. 55-56.) While most of Riverside's objections were addressed by the filing of a First Amended Disclosure Statement (the "Amended Disclosure Statement"), (ADR, Ex. 14 [Docket No. 2103]; RJN, Ex. 62), on January 17, 2007, Riverside filed a supplemental objection (collectively with the original objections, the "Riverside Objections") and continued to object to what it described as "inadequate information relating to the [VIA Settlement Agreement] Without such information, creditors cannot make an intelligent and informed decision as to whether to accept or reject the Plan." (RJN,

⁹ Thus, the language in the VIA Settlement that related to the Waiver Provision was a part of the VIA Settlement Agreement several months before the OID Issue arose and the Senior Noteholders sent Pillsbury the Indemnification Demand.

Ex. 56 at 1-2.) On January 22, 2003, Argo Partners, Inc. ("Argo"),¹⁰ a claims trader, also filed objections based on what it portrayed as inadequate disclosure related to the VIA Settlement Agreement. (ADR, Ex. 18 at 2-3 [Docket No. 2116]; RJN, Ex. 57.)

On January 23, 2007, the Bankruptcy Court held a hearing to approve the Amended Disclosure Statement. (RJN, Ex. 53.) At this hearing, Mr. Bender addressed (among other issues) the constitution of the Initial Creditors Committee and that, as far as he was aware, VIA had acknowledged that the VIA/S3G Allowed Claim was not Senior Indebtedness under the Senior Notes.¹¹ (ADR, Ex. 20 at 5:3-6:24, 24:2-24:6; RJN, Ex. 53 at 5:3-6:24, 24:2-24:6.) Significantly, Mr. Bender consistently has maintained that the Initial Creditors Committee was very pleased with the VIA Settlement Agreement, (see, e.g., RJN, Exs. 45 at ¶ 45, 53 at 11:14-18), and that everyone recognized that the VIA Settlement Agreement was a very good deal, (see, e.g., RJN, Ex. 53 at 11:14-18). Based in large part on the issues raised in the Riverside Objections and by Argo, the Bankruptcy Court directed Mr. Bender to investigate the circumstances surrounding the VIA Settlement Negotiations and to file a status report, (RJN, Ex. 53 at 47:1-50:15), which he did on February 14, 2007, (ADR, Ex. 21 [Docket No. 2138]; RJN Ex. 58). At a February 15, 2007 hearing, where Mr. Bennett appeared on behalf of the Senior Noteholders, the Bankruptcy Court directed Mr. Bender to stop investigating the matter further. (ADR, Ex. 34 at 12:14-19 [Docket No. 2176]; RJN, Ex. 59 at 12:14-19).

6. The Orders

Various motions were filed in response to the questions raised by Pillsbury's failure to affirmatively disclose its conflict with the Senior Noteholders, the Waiver Provision, and the VIA Settlement Negotiations. The U.S. Trustee filed a Motion To Appoint Chapter 11 Trustee, Or In The Alternative Motion To Appoint Examiner (the "Trustee Motion") (ADR, Exs. 28 [Docket No.

¹⁰ Argo owns a 50% interest in SonicBlue Claims, LLC ("SB Claims")—also a claims trader. (ADR, Ex. 27 at 2 [Docket No. 2150]; RJN, Ex. 61.) SB Claims did not exist at the time Argo filed its objections. SB Claims, however, now is the successor-in-interest to certain rights of VIA and S3G under the VIA Settlement Agreement. (RJN, Ex. 45 at ¶ 5.)

¹¹ Mr. Bender was informed repeatedly by VIA that it knowingly waived any claim to Senior Indebtedness when it entered into the VIA Settlement Agreement. (RJN, Ex. 45 at ¶¶ 35, 45-47.)

2153], 30 [Docket No. 2168]; RJN, Exs. 2, 4), and a Motion To Disqualify Pillsbury Winthrop Shaw Pittman LLP, To Vacate Employment Order, And For Disgorgement Of Attorneys' Fees (the "Disqualification Motion"). (ADR, Ex. 29 [Docket No. 2163]; RJN, Ex. 3.) Not to be left out, SB Claims filed a Motion To Convert Case To Chapter 7 (the "Chapter 7 Motion"). (ADR, Exs. 31 [Docket No. 2171], 32 [Docket No. 2173]; RJN, Exs. 5-6.)

a) The First Opinion

The Bankruptcy Court held a hearing on March 19, 2007 to address these motions. (RJN, Ex. 47.) Mr. Bennett again appeared on behalf of the Senior Noteholders. (RJN, Ex. 47 at 6:19-21.) On March 26, 2007, the Bankruptcy Court issued the First Opinion, which appointed a Chapter 11 Trustee, declined to convert the case from Chapter 11 to Chapter 7, and disqualified Pillsbury. (RJN, Ex. 7.)

b) The Clarification Denial Order

On April 4, 2007, the Senior Noteholders filed a Motion For Clarification, Or In The Alternative, Leave To File A Motion For Reconsideration (the "Clarification Motion"). (ADR, Ex. 51 [Docket No. 2231]; RJN, Ex. 8.) The Clarification Motion sought "clarification or reconsideration of certain statements in the [First Opinion], which could be misconstrued as suggesting that the Court made certain factual findings or conclusions unnecessary to the decision of the motions before the Court and unsupported by the record." (RJN, Ex. 8 at 1.) Specifically, the Senior Noteholders were concerned that the following statements in the First Opinion could be misconstrued:

1. The rights to use Intel's graphics patents were so important that the joint venture agreement included a liquidated damages clause at article 5.6 entitling the joint venture and VIA each to damages of up to \$70 million if the joint venture were ever enjoined from using the Intel cross-license; and

2. Because the bondholders appear to have used their position on the committee to insert themselves into the settlement negotiations without revealing a hidden agenda, they may have breached their fiduciary duty to the unsecured creditor body. Whether their motive was simply to save litigation costs for the estate by avoiding future litigation over the priority of VIA's claim, or, instead, to assure a larger return on their individual investments is not known. In fact, as Bennett noted, he had never personally appeared in court until March 19, 2007. During the four years of this case, he has operated in the shad-

ows and, until January 23, 2007, it was not generally known to this court or the creditor body that the three senior bondholders were serving on the Committee (collectively, the "Findings").

(RJN, Ex. 8 at 1.)

After a hearing respecting the Clarification Motion on May 4, 2007, (ADR, Ex. 61 [Docket No. 2303]; RJN, Ex. 60), the Bankruptcy Court immediately issued its Clarification Denial Order denying the Clarification Motion. (ADR, Ex. 57 [Docket No. 2279]; RJN, Ex. 11.) The Bankruptcy Court began the Clarification Denial Order by stating: "Let there be no doubt that the words and findings of my [First Opinion] were carefully selected to respond to the issues then before the court" (RJN, Ex. 11 at 1.) The Bankruptcy Court then provided additional facts to support its characterization of the Senior Noteholders and Mr. Bennett in the First Opinion. Although Mr. Bennett was under no duty to volunteer information to Mr. Bender and Mr. Bender had described him as extremely cooperative during his investigation,¹² the Bankruptcy Court nonetheless found that "it does not appear that Bennett ever volunteered relevant information despite the ongoing investigation and Bender's active efforts to pursue answers." (RJN, Ex. 11 at 3.) The Bankruptcy Court concluded by stating that "[t]he appearance of concealment by the senior noteholders and Bennett was one of the grounds for the appointment of a trustee." (RJN, Ex. 11 at 4.)

Since his appointment, the Chapter 11 Trustee has undertaken a comprehensive investigation into: (1) the conduct of professionals and other fiduciaries in the Bankruptcy Proceedings prior to his appointment, including Pillsbury and LNBRB; and (2) the circumstances leading up to and surrounding the VIA Settlement Agreement (the "Trustee Investigation").

c) The Notice Of Appeal

In response to the Orders, the Senior Noteholders filed their Notice of Appeal on May 11, 2007. (ADR, Ex. 58 [Docket No. 2292]; RJN, Ex. 33.) The Senior Noteholders appeal the Orders

¹² According to Mr. Bender, Mr. Bennett did everything he was asked in connection with Mr. Bender's investigation. For example, Mr. Bender described Mr. Bennett as having "been extremely cooperative from the outset." (ADR, Ex. 21, Declaration of Ron Bender in Support of His Submission of Preliminary Status Report ("Bender Status Report Decl.") at ¶ 25 [Docket No. 2138]; RJN, Ex. 58 at ¶ 25.) Mr. Bender also stated that Mr. Bennett had made a complete document production and was scheduled to be deposed before Mr. Bender continued it to allow for a ruling on confidential documents. (RJN, Ex. 58 at ¶ 25.)

on the basis that the Bankruptcy Court: (1) mistakenly determined that VIA has a claim against the Debtor related to the loss of the use of the patent licensing agreement by S3G and the liquidated damages remedy for that loss (the "VIA Claim Issue"); and (2) mistakenly made conclusions regarding the role of the Senior Noteholders and their counsel during the VIA Settlement Negotiations (the "Senior Noteholders Issue," collectively with the VIA Claim Issue, the "Appellate Issues"). (RJN, Ex. 66 at 7 [Docket No. 2308].)

7. The Adversary Proceeding

SB Claims acquired the VIA/S3G Allowed Claim on April 27, 2007. This was, however, *after* all of the alleged improper conduct by Pillsbury and the Senior Noteholders had occurred. But it is this alleged conduct that forms the basis for the relief requested in the Adversary Proceeding and the Motions for Partial Modification of the Settlement Order described below. (RJN, Ex 28 at ¶ 5 [Adversary Proceeding Docket No. 1].) At the time, SB Claims was fully aware of the alleged conduct, and, in fact, acquired the VIA/S3G Allowed Claim specifically with the intent of seeking relief premised upon it. Indeed, the Claim Transfer Agreement itself recites that "[a] dispute has arisen in the Bankruptcy Cases as to the propriety of" VIA/[S3G's] acknowledgment that the [VIA/S3G Allowed Claim] is not Senior Indebtedness "and as to whether such [VIA/S3G Allowed Claim] is, or is not, 'Senior Indebtedness' under the Indenture," and that "[a] dispute also has arisen as to whether the provisions in the [VIA Settlement Agreement] were adequately disclosed to the Bankruptcy Court and other parties in interest." (RJN, Ex. 13, Claims Transfer Agreement, at 3 [Docket No. 2316].)¹³

On May 30, 2007, SB Claims filed an adversary proceeding, Case No. 07-05082, naming the Senior Noteholders as defendants (the "Adversary Proceeding"). The complaint seeks an order from the Bankruptcy Court: (1) equitably subordinating certain claims of senior indebtedness based upon inequitable conduct by a number of different individuals and interests in the Chapter 11 cases;

¹³ The Senior Noteholders dispute that any part of the liability compromised pursuant to the VIA Settlement Agreement is or ever was due to VIA. The agreement that gave rise to the VIA/S3G Allowed Claim imposes obligations on SONICblue to make payments and render performance to S3G, not to VIA. The notion that S3G could "allocate" to VIA a claim owed to S3G and, in the process, provide that claim with seniority where none previously existed finds no support in the Indenture or anywhere else. The 2002 Noteholders reserve all rights in this regard.

(2) classifying the VIA/S3G Allowed Claim as Senior Indebtedness; and (3) declaratory relief in connection with the same (the "Adversary Complaint"). (RJN, Ex. 28.) On July 11, 2007, the Senior Noteholders filed a Motion to Dismiss the Adversary Proceeding (the "Senior Noteholders' Motion to Dismiss"), (RJN, Ex. 29 [Adversary Proceeding Docket No. 12]), which was denied by the Bankruptcy Court on October 2, 2007. (RJN, Ex. 31 [Adversary Proceeding Docket No. 49].)

8. The Chapter 11 Trustee's Proposed Plan And Disclosure Statement

The Chapter 11 Trustee filed its proposed plan (the "Plan"), (RJN 15 [Docket No. 2391]), and disclosure statement (the "Trustee's Disclosure Statement"), (RJN, Ex. 16 [Docket No. 2392]), on July 20, 2007, and, thereafter, sought an order from the Bankruptcy Court approving the Trustee's Disclosure Statement as containing "adequate information" in accordance with Section 1125 of the Bankruptcy Code. On August 21, 2007, SB Claims filed an objection to the Trustee's Disclosure Statement (the "Section 1125 Objection"), (RJN, Ex. 17 [Docket No. 2429]), and subsequently served deposition notices on various parties purportedly in connection with its Section 1125 Objection.

On August 27, 2007, the Chapter 11 Trustee filed an emergency motion seeking entry of a protective order with respect to these deposition notices on the theory that the information sought therein is wholly unrelated to the Section 1125 Objection ("Protective Order Motion"), (RJN, Ex. 18 [Docket No. 2436]), which SB Claims opposed on September 5, 2007 ("Protective Order Opposition"), (RJN, Ex. 20 [Docket No. 2458]). At the hearing on the Protective Order Motion, the Bankruptcy Court made it clear that it did not want the Plan to go forward before the Chapter 11 Trustee completed the Trustee Investigation (as described below). (RJN, Ex. 21 at 12:8-13:15, 18:20-22 [Docket No. 2504].) Accordingly, the Chapter 11 Trustee voluntarily removed the Disclosure Statement from the calendar, thereby stopping the plan process from proceeding.

9. The Motion To Reconstitute The Initial Creditors Committee

On June 11, 2007, SB Claims filed a motion to reconstitute the Initial Creditors Committee (the "Motion to Reconstitute"). (RJN, Ex. 14 [Docket No. 2341].) In support of the Motion to Reconstitute, SB Claims merely regurgitated the Findings regarding the purported conduct of the Sen-

ior Noteholders and their counsel. (See RJN, Exs. 7 at 17; 11 at 3.) SB Claims, however, did not file any supporting declarations or offer any new evidence to support its allegations with respect to the actions of the Senior Noteholders or the Initial Creditors Committee.

The Bankruptcy Court relied on these very same facts in ordering the reconstitution of the Initial Creditors Committee, finding at the hearing that the Senior Noteholders had failed to disclose their involvement in the settlement negotiations, had failed to disclose the Conflict of Interest with Pillsbury, and had failed to disclose their role within the Initial Creditors Committee. (RJN, Ex. 22 at 50:14–52:12 [Docket No. 2505].) Notwithstanding that the facts and conclusions alleged by SB Claims were subject to the instant appeal, and that *no new evidence* was introduced at the hearing despite the Senior Noteholders' counsel's request for an evidentiary hearing, (RJN, Ex. 22 at 27:9-13, 33:3-7), and that the U.S. Trustee's position that there were no facts in the record to support the relief requested, (RJN, Ex. 22 at 45:19 – 46:5), the Bankruptcy Court ruled that the facts supported a ruling that the U.S. Trustee had abused her discretion in failing to reconstitute the Initial Creditors Committee, (RJN, Ex. 22 at 50:18-21). The Bankruptcy Court granted the Motion to Reconstitute on October 4, 2007 (the "Reconstitution Order"). (RJN, Ex. 23 [Docket No. 2510].) In accordance therewith, the U.S. Trustee dissolved the Initial Creditors Committee on October 10, 2007. (RJN, Ex. 25 [Docket No. 2520].)

10. The Motions To Partially Vacate The Settlement Order

On October 31, 2007, despite the ongoing Adversary Proceeding directed at the very same conduct, SB Claims filed two duplicative motions to modify or vacate in part the order approving the VIA Settlement (collectively, the "Motions for Partial Modification of the Settlement Order"). The first of these motions is directed at the conduct of the Senior Noteholders ("Motion for Partial Relief from Settlement Order"). (RJN, Ex. 26 [Docket No. 2545].) The second of these motions seeks the same relief but is directed at Pillsbury's conduct, alleging that Pillsbury committed fraud on the Bankruptcy Court because of the undisclosed Conflict of Interest ("Motion to Vacate or Modify Settlement Order"). (RJN, Ex. 27 [Docket No. 2548]).¹⁴

¹⁴ SB Claims filed a Supplement to Motion to Modify and/or Vacate Settlement Order, (RJN, Ex. 63 [Docket No. 2558]), in which it contends that Pillsbury also committed a fraud on the court

1 **C. The Motion To Dismiss The Appeal**

2 As discussed above, the Senior Noteholders have appealed the decisions of the Orders. On
3 October 11, 2007, the Chapter 11 Trustee filed his Motion that seeks to dismiss the Appeal for lack
4 of jurisdiction. As will be shown below, the Appellate Issues do indeed provide this Court with
5 jurisdiction.

6 **III. RELIEF REQUESTED**

7 As long as the Bankruptcy Court and the parties in these Bankruptcy Cases operate under
8 the assumption that the Findings are etched in stone, the underlying bankruptcy estate (and inno-
9 cent creditors) will continue to bleed from a thousand cuts as a result of the various contested mat-
10 ters that have been filed based primarily on the Findings. In opposition to the Motion (the “Oppo-
11 sition”), the Senior Noteholders submit that they have standing to bring the Appeal, and that appel-
12 late review is warranted. Moreover, it is important that the Bankruptcy Court take no further action
13 with respect to these matters while the Appellate Issues are subject to review. Hence, the Senior
14 Noteholders combine their Opposition with a cross-motion to stay matters below that relate to the
15 Findings pending review. Alternatively, or in conjunction with such a stay, cause exists to with-
16 draw the reference to permit this Court to deal with all such matters in a single, judicially efficient
17 forum. Only then can the interests of justice prevail.

18 As revealed in the recent status report of the Chapter 11 Trustee, the Senior Noteholders
19 were willing to consent to a reserve above and beyond the amount of the VIA/S3G Allowed Claim
20 to protect the protagonists if they are successful on their theories. (RJN, Ex. 24.) Indeed, the Sen-
21 ior Noteholders have no objection to resolving the pending litigation in a fair and prompt manner—
22 without other creditors being held up with respect to their deserved distributions and without bleed-
23 ing the estate dry with unnecessary litigation. Thus, the Senior Noteholders request that this Court:
24 (1) deny the Motion; (2) enter an order staying the pending Motions for Partial Modification of the
25 Settlement Order and the Adversary Proceeding related to the same (except for discovery which
26
27 because Pillsbury failed to disclose a tolling agreement it reached with former officers of the
28 Debtor after those directors sought indemnification from Pillsbury based on a suit filed by the jun-
ior noteholders. (RJN, Ex. 63 at 5.)

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re

SONICBLUE INCORPORATED,
a Delaware corporation, DIAMOND
MULTIMEDIA SYSTEMS, INC.,
a Delaware corporation, REPLAYTV,
INC., a Delaware corporation, and
SENSORY SCIENCE CORPORATION,
a Delaware corporation,

Debtors.

Case Nos. 03-51775 through 03-51778

Chapter 11 Cases

Jointly Administered

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE BY MAIL

I, Patricia Bloom, hereby declare:

I am over the age of 18 years and not a party to or interested in the within entitled cause. I am an employee of Stroock & Stroock & Lavan LLP and my business address is 2029 Century Park East, 18th Floor, Los Angeles, California 90067-3086. I am familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 20, 2007, at my place of business as listed above, the following documents

**NOTICE OF MOTION AND MOTION TO WITHDRAW REFERENCE OF
CHAPTER 11 CASES**

were placed for deposit in the United States Postal Service, for collection and mailing on that date, following ordinary business practices, in a sealed envelope(s), with postage fully prepaid, addressed as shown on the attached service list.

I declare that I am employed in an office of a member of the bar of this Court, at whose direction the within service was made. I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

EXECUTED on November 20, 2007, at Los Angeles, California.

/s/ Patricia Bloom
Patricia Bloom

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	Menlo Park, CA 94025	
14	Arlana Stewart	Falcon Advisors, Inc.
15	10841 North Woodrow Avenue	c/o Craig B. Florence, Esq.
16	Fresno, CA 93730-5159	Gardere, Wynne & Sewell LLP
		1601 Elm Street, Suite 3000
		Dallas, TX 75201
17	AT&T Capital Corporation	Florida Department of Revenue
18	Instrument & Data Services	Bankruptcy Department
19	1830 W. Airfield Drive	Doyle E. Carlton Bldg.
	DFW Airport, TX 75261	501 S. Calhoun Street, Room 343
		Tallahassee, FL 32399-0100
20	Citicorp Vendor Finance, Inc.	Jonathan Neil & Associates, Inc.
21	c/o Corporation Service Company Which Will Do	c/o Glassberg, Pollak & Associates
22	Business in California as CSC – Lawyers	44 Montgomery Street, Suite 1660
	Incorporating Service	San Francisco, CA 94104
23	2730 Gateway Oaks Drive, Suite 100	
	Sacramento, CA 95833	
24	Citicorp Vendor Finance, Inc.	Suzana Pereira
25	700 East Gate Drive, Suite 400	Lucent Technologies Inc.
26	Park Ridge, NJ 08054	600 Mountain Avenue
		Room 7F513
		Murray Hill
27		Berkeley Heights, NJ 07974
28		

1	County of Santa Clara	Quail Creek Bank NA
2	Tax Collector	12202 North May Street
3	70 West Hedding Street	Oklahoma City, OK 73120
4	San Jose, CA 95110	(Also served by 1st Class mail-P.O. Box 20160)
		Oklahoma City, OK 73156
5	County Tax Assessor, GA	Raymond Leasing Corporation
6	Clerk of the Court	Corporate Headquarters
7	Gwinnett Superior Court, Real Estate Division	8-20 South Canal Street
8	75 Langley Drive	Greene, NY 13778
9	Lawrenceville, GA 30045	
10	County Tax Assessor, GA	Red Lion Hotels Inc.
11	Gwinnett Assessor's Office	755 Crossover Lane
12	75 Langley Drive	Memphis, TN 38117
13	Lawrenceville, GA 30045	
14	Digital Commerce Corporation	
15	c/o Alan Krenak	
16	Agent for Service of Process	
17	575 Herndon Parkway, Suite 300	
18	Herndon, VA 20170	
19	Richardson Independent School District	S3 Incorporated
20	400 South Greenville Avenue	1801 Mission College Blvd.
21	Richardson, TX 75081	Santa Clara, CA 95054
22	Attn: Mia Martin, General Counsel	
23	Richardson Independent School District	Joseph Kincaid
24	c/o Randall L. Shepherd, Esq.	Swanson, Martin & Bell
25	Law Offices of Robert E. Luna P.C.	Counsel for Raymond Leading
26	4411 N. Central Expressway	1 IBM Plaza
27	Dallas, TX 75205	Suite 28900
28		330 N. Wabash
		Chicago, IL 60611
	Round Rock Independent School District	West Virginia State Tax Department
	c/o Brian E. Brown, Esq.	1001 Lee Street
	Linebarger, Goggan, Blair, Sampson & Pena LLP	Charleston, West Virginia 25321
	1949 South I.H. 35	
	P.O. Box 17428	
	Austin, TX 78760	
	Round Rock Independent School District	
	c/o Nelda Wells Spears	
	Assessor and Collector of Taxes	
	County of Travis	
	1010 Lovaca	
	Austin, TX 78701	

1	Bank One	USB PaineWebber
2	Attn: Eugene O'Connor	Attn: Legal Department
3	Legal Dept. – AZ1-1314	One North Wacker Drive, Suite 2500
4	201 North Central Avenue	Chicago, IL 60606
5	Phoenix, AZ 85004	
6	Kevin Zeidan	Wells Fargo
7	Vice President	Attn: Legal Department
8	Comerica Bank – California	Commercial Banking MAC S4101-251
9	One Market Plaza	100 West Washington
10	Spear Street Tower, Suite 1830	Phoenix, AZ 85003
11	San Francisco, CA 94105	
12	Credit Suisse First Boston	Wells Fargo
13	Attn: Legal Department	Attn: Legal Department
14	600 California Street, 20th Floor	121 Park Plaza
15	San Francisco, CA 94108	3rd Floor
16		San Jose, CA 95113
17	Internal Revenue Service	Securities and Exchange Commission
18	Special Procedure Section - Bankruptcy	SEC Headquarters
19	55 South Market Street	100 F Street, NE
20	HQ6600	Washington, DC 20549
21	San Jose, CA 95113	
22	Office of the U.S. Trustee	Securities and Exchange Commission
23	Nanette Dumas, Esq.	San Francisco District Office
24	280 South First Street	44 Montgomery Street, Suite 2600
25	Room 268	San Francisco, CA 94104
26	San Jose, CA 95113	
27	Securities and Exchange Commission	The Nasdaq Stock Market
28	Sarah Moyed, Bankruptcy Unit	P.O. Box 7777-W9740
29	5670 Wilshire Boulevard, 11th Floor	Philadelphia, PA 19175-9740
30	Los Angeles, CA 90036	
31	JDS Capital Management, Inc.	Loomis, Sayles & Company, LP
32	Joe D. Samberg	Christopher Keller
33	100 Park Ave Fl 17	One Financial Center
34	New York, NY 10017-5569	Boston, MA 02111
35	Monarch Capital	Credit Research & Trading LLC
36	Matt Waldon	Michael Vaughn
37	1250 Monarch Plaza	One Fawcett Place
38	3414 Peachtree Road NE	Greenwich, CT 06830
39	Atlanta, GA 30326	
40	Orbitex Financial Services Group, Inc.	
41	Neil Feinberg	
42	410 Park Avenue	
43	18th Floor	
44	New York, NY 10022	

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